

ARKANSAS CODE  
OF 1987  
ANNOTATED

OFFICIAL EDITION



VOLUME 29 • TITLE 28



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# ARKANSAS CODE OF 1987 ANNOTATED



## VOLUME 29

2012 Replacement

### TITLE 28: WILLS, ESTATES, AND FIDUCIARY RELATIONSHIPS

*Prepared by the Editorial Staff of the Publisher*

Under the Direction and Supervision of the  
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## Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2011 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2011 Ark. LEXIS 519 (October 13, 2011) and 2011 Ark. App. LEXIS 652 (October 12, 2011).

Federal Supplement through October 7, 2011.

Federal Reporter 3d Series through October 7, 2011.

United States Supreme Court Reports through October 7, 2011.

Bankruptcy Reporter through October 7, 2011.

Arkansas Law Notes through the 2008 Edition.

Arkansas Law Review through Volume 61, p. 787.

University of Arkansas at Little Rock Law Review through Volume 30, p. 267.

ALR 6th through Volume 55, p. 635.

ALR Fed. 2d through Volume 46, p. 473.

## **Titles of the Arkansas Code**

- |   |   |
|---|---|
| 1. General Provisions   | 16. Practice, Procedure, and Courts             |
| 2. Agriculture  | 17. Professions, Occupations, and Businesses    |
| 3. Alcoholic Beverages  | 18. Property                                    |
| 4. Business and Commercial Law                                  | 19. Public Finance                              |
| 5. Criminal Offenses  | 20. Public Health and Welfare                   |
| 6. Education  | 21. Public Officers and Employees               |
| 7. Elections  | 22. Public Property                             |
| 8. Environmental Law  | 23. Public Utilities and Regulated Industries   |
| 9. Family Law   | 24. Retirement and Pensions                     |
| 10. General Assembly  | 25. State Government                            |
| 11. Labor and Industrial Relations                              | 26. Taxation                                    |
| 12. Law Enforcement, Emergency Management, and Military Affairs | 27. Transportation                              |
| 13. Libraries, Archives, and Cultural Resources                 | 28. Wills, Estates, and Fiduciary Relationships |
| 14. Local Government  |   |
| 15. Natural Resources and Economic Development                  |   |



## **User's Guide**

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Revision Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of the bound Volume 1 of the Code.



# **TITLE 28**

## **WILLS, ESTATES, AND FIDUCIARY RELATIONSHIPS**

### *SUBTITLE 1. GENERAL PROVISIONS*

#### CHAPTER.

1. GENERAL PROVISIONS.
2. DISCLAIMER OF PROPERTY.
- 3-7. [RESERVED.]

### *SUBTITLE 2. DESCENT AND DISTRIBUTION*

#### CHAPTER.

8. GENERAL PROVISIONS.
9. INTESTATE SUCCESSION.
10. UNIFORM SIMULTANEOUS DEATH ACT.
11. DOWER AND CURTESY.
12. DISPOSITION OF COMMUNITY PROPERTY.
13. ESCHEATED ESTATES.
14. UNIFORM TOD SECURITY REGISTRATION ACT.
- 15-23. [RESERVED.]

### *SUBTITLE 3. WILLS*

#### CHAPTER.

24. GENERAL PROVISIONS.
25. EXECUTION AND REVOCATION.
26. CONSTRUCTION AND OPERATION.
27. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT.
- 28-37. [RESERVED.]

### *SUBTITLE 4. ADMINISTRATION OF DECEDENTS' ESTATES*

#### CHAPTER.

38. GENERAL PROVISIONS.
39. RIGHTS OF SURVIVING FAMILY MEMBERS.
40. PROBATE AND GRANT OF ADMINISTRATION.
41. DISTRIBUTION WITHOUT ADMINISTRATION.
42. ANCILLARY ADMINISTRATION.
- 43-47. [RESERVED.]
48. PERSONAL REPRESENTATIVES.
49. MANAGEMENT OF ASSETS.
50. CLAIMS AGAINST ESTATES.
51. TRANSFERS OF PROPERTY.
52. ACCOUNTING.
53. DISTRIBUTION AND DISCHARGE.
54. UNIFORM ESTATE TAX APPORTIONMENT ACT.
- 55-63. [RESERVED.]

### *SUBTITLE 5. FIDUCIARY RELATIONSHIPS*

#### CHAPTER.

64. GENERAL PROVISIONS. [RESERVED.]



## CHAPTER.

- 65. GUARDIANS GENERALLY.
- 66. UNIFORM VETERANS' GUARDIANSHIP ACT.
- 67. CONSERVATORS FOR THE AGED AND DISABLED.
- 68. UNIFORM POWER OF ATTORNEY ACT.
- 69. FIDUCIARIES GENERALLY.
- 70. UNIFORM PRINCIPAL AND INCOME ACT.
- 71. INVESTMENT OF TRUST FUNDS.
- 72. PARTICULAR TRUSTS.
- 73. ARKANSAS TRUST CODE.
- 74. UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT.

## APPENDIX.

## OFFICIAL PROBATE FORMS

***SUBTITLE 1. GENERAL PROVISIONS*****CHAPTER 1****GENERAL PROVISIONS**

## SECTION.

- 28-1-101. Title.
- 28-1-102. Definitions.
- 28-1-103. Effect of code.
- 28-1-104. Probate proceedings.
- 28-1-105. [Repealed.]
- 28-1-106. Referees and probate clerks.
- 28-1-107. [Repealed.]
- 28-1-108. Records.
- 28-1-109. Petition — Verification.
- 28-1-110. Filing objections to petition.
- 28-1-111. Guardians and attorneys ad litem.

## SECTION.

- 28-1-112. Notice — Service — Proof — Costs.
- 28-1-113. Waiver of notice.
- 28-1-114. [Repealed.]
- 28-1-115. Vacation and modification of orders.
- 28-1-116. Appeals.
- 28-1-117. Use of certified mail permitted.
- 28-1-118. Deceased viable fetus.
- 28-1-119. Access to decedent's autopsy records.

**Publisher's Notes.** For Comments regarding the Probate Code of 1949, see Commentaries Volume B.

**Cross References.** Powers of fiduciary, inclusion in trust instrument by reference, § 28-69-301 et seq.

**Preambles.** Acts 1957, No. 29, contained a preamble which read: "Whereas, the purpose of having official documents served or transmitted by registered mail is to establish proof of mailing and delivery through the system of receipts provided for such mail; and

"Whereas, the Postmaster General has recently established the certified mail service which provides a cheaper means for the transmission of such documents and at the same time provides a system of receipts to prove mailing and delivery...."

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1975, No. 620, § 16: July 1, 1975.

## RESEARCH REFERENCES

**Ark. L. Rev. Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.**

**U. Ark. Little Rock L.J. Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.**

### 28-1-101. Title.

This act may be cited as the "Probate Code".

**History.** Acts 1949, No. 140, § 1; A.S.A. 1947, § 62-2001.

**Meaning of "this act".** Acts 1949, No. 140, codified as §§ 28-1-101 — 28-1-104, 28-1-106, 28-1-108 — 28-1-113, 28-1-115, 28-1-116, 28-24-101, 28-24-102, 28-25-101 — 28-25-105, 28-25-108 — 28-25-110, 28-26-101 — 28-26-105, 28-39-101, 28-39-105, 28-39-401 — 28-39-407, 28-40-101 — 28-40-123, 28-41-101 — 28-41-104, 28-42-101 — 28-42-109, 28-48-101 — 28-48-105, 28-48-107 — 28-48-109, 28-48-201 — 28-48-209, 28-48-301 — 28-48-305, 28-49-101 — 28-49-117, 28-50-101 — 28-50-114, 28-51-101 — 28-51-109, 28-51-201 — 28-51-203, 28-51-301 — 28-51-309, 28-52-101 — 28-52-110, 28-53-101 — 28-53-109, and 28-53-111 — 28-53-119.

### 28-1-102. Definitions.

(a) As used in the Probate Code:

(1) "Child" denotes a natural or adopted child, but does not include a grandchild or other more remote descendant or an illegitimate child except such as would inherit under the law of descent and distribution;

(2) "Claims" includes liabilities of the decedent which survive, whether arising in contract or tort or otherwise, funeral expenses, the cost of a tombstone, expenses of administration, and estate and inheritance taxes;

(3) "County", as applied to counties having more than one (1) district, means "district" unless the sense in which it is used or the applicable law indicates otherwise;

(4)(A) "Devise", when used as a noun, means disposition of real or personal property, or both, by will.

(B) "Devise", when used as a verb, means to dispose of real or personal property, or both, by will;

(5) "Devisee" includes legatee;

(6) "Distributee" denotes a person entitled to real or personal property of a decedent, either by will, as an heir, or as a surviving spouse;

(7) "Estate" denotes the real and personal property of the decedent or ward as from time to time changed in form by sale, reinvestment, or otherwise and as augmented by any accretions and additions and substitutions and diminished by any decreases and distributions;

(8) "Fiduciary" includes personal representative, guardian, and testamentary trustee;

(9) "Foreign personal representative" means a personal representative serving under appointment made by a court of competent jurisdiction

tion of another state or territory of the United States or the District of Columbia;

(10) "Heir" denotes a person entitled by the law of descent and distribution to the real and personal property of an intestate decedent, but does not include a surviving spouse;

(11) "Interested persons" includes any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered, and a fiduciary;

(12) "Lease" includes an oil, gas, or mineral lease;

(13) "Legacy" means a disposition of personal property by will;

(14) "Legatee" means a person entitled by will to personal property;

(15) "Letters" includes letters testamentary, of administration, and of guardianship;

(16) "Mortgage" includes deed of trust and vendor's lien;

(17) "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, dower, family allowances, and enforceable claims against the estate;

(18) "Person" includes a corporation, partnership, or other legal entity;

(19)(A) "Personal representative" means an executor or administrator.

(B) However, for purposes of obtaining autopsy results that are in the medical records, the personal representative is the first of the following individuals or category of individuals who exists when the request for a copy of the autopsy results maintained in the medical records is made:

(i) The executor or administrator;

(ii) The decedent's spouse;

(iii) A parent of the decedent; or

(iv) An adult child of the decedent; and

(20) "Will" includes codicil.

(b) As used in the Probate Code:

(1) The singular includes the plural, and the plural includes the singular; and

(2) The masculine gender includes the feminine and neuter.

**History.** Acts 1949, No. 140, § 3; A.S.A. 1947, § 62-2003; Acts 2011, No. 722, § 1.

**Amendments.** The 2011 amendment added (19)(B).

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

## CASE NOTES

### ANALYSIS

Child.

Claims.

Distributees.

Interested Persons.

Personal Representative.

### Tests.

#### Child.

The General Assembly did not intend for a grandchild to be defined as a child under subdivision (a)(1) of this section. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).



Because there is no comma separating "illegitimate child" and the modifier "except such as would inherit under the law of descent and distribution" in subdivision (a)(1) of this section, the General Assembly intended for "except such as would inherit..." to modify only "illegitimate children." *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

The phrase "except such as would inherit under the law of descent and distribution" in subdivision (a)(1) of this section does not modify the word "grandchild." *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

The minor grandchildren of a decedent who would inherit from the decedent under the laws of descent and distribution do not have homestead rights under § 28-39-201, because they do not fall within the definition of "child" in subdivision (a)(1) of this section. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

Decedent's illegitimate, pretermitted child was not entitled to inherit from decedent as he was required to meet requirements of § 28-39-407(b), subdivision (a)(1) of this section, and the six requirements of § 28-9-209(d), but he failed to show that he had been recognized by the decedent or by a court and he failed to file his action within 180 days of decedent's death. *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

### Claims.

Definition of word "claims" used in Probate Code to include estate taxes applies to "claims" only as it is used in Probate Code and has nothing to do with the apportionment of estate taxes. *Williamson v. Williamson*, 224 Ark. 141, 272 S.W.2d 72 (Ark. 1954).

Where a lawsuit pending in a circuit court was not a claim against the estate, but was a suit against the executor individually, the court did not err in closing the estate since there was no pending claim against the estate as defined by subdivision (2) of this section. *Bostic v. Bostic Estate*, 281 Ark. 167, 662 S.W.2d 815 (1984).

### Distributees.

Both the widow and heirs at law are distributees of a solvent intestate estate under this section and § 28-53-113 and therefore secured debts are to be dis-

charged out of the general estate, unpledged personal property, where the creditor does not pursue the security which gives the widow a dower right in the entire security free from the debt. *Wilcox v. Brewer*, 224 Ark. 546, 274 S.W.2d 777 (1955).

### Interested Persons.

Where administrator is removed for failure to qualify and physical incapacity, it is unnecessary for the court to determine whether person bringing matter to court's attention was an interested party. *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959).

Since, under § 28-25-102, an attesting witness to be "interested" must receive a beneficial interest by way of devise, an attorney signing will as attesting witness was not "interested," although the firm with which he was associated was named to represent the estate. *Rosenbaum v. Cahn*, 234 Ark. 290, 351 S.W.2d 857 (1961).

One claiming damages for the alleged negligence of the decedent is not an interested person within the definition of this section. *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970).

Where plaintiffs filed an action against the administrator prior to his resignation as administrator, plaintiffs were "interested parties" within the meaning of this section and "aggrieved parties" within the meaning of § 28-1-116 for purposes of appealing from probate orders that affected those proceedings. However, as such a resignation is ordinarily a matter of discretion for the probate judge and in this case had no effect on venue and § 28-48-107 gives plaintiffs a remedy for the appointment of another administrator, there was no abuse of discretion in allowing the resignation to stand. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

Once a trial judge rejects the report on the public sale of estate land, the status of the parties who had bid for the land can no longer be described as interested parties; at best, their position is that of potential bidders at any future sale, and hence they have no standing to contest a petition on behalf of the heirs of an estate. *Estate of Hodges v. Wilkie*, 14 Ark. App. 297, 688 S.W.2d 307 (1985).

Where the decedent died testate and left them nothing under the will, the de-

cedent's surviving children were not heirs and were not creditors, and were thus not "interested persons" as that term is used in subdivision (a)(11) of this section, § 28-48-105(a)(2), or § 28-48-107(a). *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

On petition to probate court to set aside order authorizing sale of decedent's land, where petitioners were not heirs or creditors, where their petition did not assert any claim against the estate or declare any interest in the estate's property, and where they did not indicate any entitlement to proceeds which might be distributed by the estate, but in fact were persons against whom the estate had sought relief, the petitioners were not interested persons as defined by subdivision (a)(11) and had no standing to question the issuance of the court's order. *White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996).

Appellant was an "interested person" as defined in subdivision (a)(11) where appellant was specifically named in the will as a beneficiary of a trust; the fact that appellant was a beneficiary of the trust meant that appellant had "an interest in the estate." *Spicer v. Estate of Spicer*, 55 Ark. App. 267, 935 S.W.2d 576 (1996).

Appellants were interested persons entitled to seek removal of an estate's personal representative where they were potential heirs of the intestate estate. *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000).

Although appellant argued that there was no evidence that anyone received notice of the hearing set on the final accounting, which appellant claimed violated § 28-1-112, the argument was without merit, given the notices that the trial court sent out after excluding appellant from distribution of the estate, and appellant conceded to having received actual notice in any event and possibly not hav-

ing been entitled to notice in the first place; because appellant had been excluded, she was not an interested person under subdivision (11) of this section and so there was no legal requirement that she be served notice, and she lacked standing to complain about the failure to send notice to others who had not appealed. *Seymour v. Biehslich*, 371 Ark. 359, 266 S.W.3d 722 (2007).

Appellee was not an "interested person" as defined in subdivision (a)(11) of this section with standing to petition the probate court. Appellee failed to offer any testimony that there was a service contract between the decedent and herself, and there was no evidence that the services she provided for the decedent were of any extraordinary character. *Lucas v. Wilson*, 2011 Ark. App. 584, — S.W.3d — (2011).

### Personal Representative.

The term "personal representative" includes both general and special administrators. *Nickles v. Wood*, 221 Ark. 630, 255 S.W.2d 433 (1953).

### Tests.

While a prosecuting attorney clearly has a duty to disclose all pertinent test on tangible items pursuant to ARCrP 17.1, the prosecutor is not required to make certain scientific tests on all materials seized. *State v. Pulaski County Circuit Court*, 316 Ark. 514, 872 S.W.2d 414 (1994).

**Cited:** *Holt v. Moody*, 234 Ark. 245, 352 S.W.2d 87 (1961); *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970); *Sutton v. Milburn*, 289 Ark. 421, 711 S.W.2d 808 (1986); *Sanders v. Ryles*, 318 Ark. 418, 885 S.W.2d 888 (1994); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997); *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (Ark. 1997); *Barrera v. Vanpelt*, 332 Ark. 482, 965 S.W.2d 780 (1998).

## 28-1-103. Effect of code.

(a) **EFFECTIVE DATE.** The Probate Code shall take effect on July 1, 1949, except that, when its application, or parts thereof, would not be feasible or would work injustice in particular proceedings then pending, the former procedure shall apply.

(b) **RIGHTS NOT AFFECTED.** Acts done and rights accrued prior to July 1, 1949, shall not be affected or impaired by its provisions. When a right is acquired, extinguished, or barred upon the expiration of a prescribed



period of time which has commenced to run by the provision of any statute in force before the Probate Code takes effect, the provision shall remain in force and be deemed a part of the Probate Code with respect to such a right.

**History.** Acts 1949, No. 140, § 2; A.S.A. 1947, § 62-2002.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

## CASE NOTES

### ANALYSIS

Exceptions.

Rights Arising Prior to Code.

#### Exceptions.

The probate of a will which, together with necessary proof of its execution, had been filed with the probate clerk in 1947, but which the clerk had failed to enter an order admitting to probate came within the exceptions of this section, and § 28-40-103 limiting the time for probate did not apply. *Muldrew v. Dodson*, 237 Ark. 852, 376 S.W.2d 672 (1964).

#### Rights Arising Prior to Code.

Proceeding in 1950 to probate will of person who died in 1935 was not barred by

five-year limitation period contained in 1949 Code, since Probate Code is not retroactive. *Hudson v. Hudson*, 219 Ark. 211, 242 S.W.2d 154 (1951).

This section is not retroactive, and therefore a probate court was not authorized to hear a petition to set aside prior order of probate court disposing of estate in 1943 on grounds that petitioner was actual heir since only the circuit or chancery courts could determine questions of heirship at that time. *Adams v. Hart*, 228 Ark. 687, 309 S.W.2d 719 (1958).

**Cited:** *Mosely v. Mosely*, 217 Ark. 536, 231 S.W.2d 99, 18 A.L.R.2d 695 (1950).

## 28-1-104. Probate proceedings.

The circuit court shall have jurisdiction over:

- (1) The administration, settlement, and distribution of estates of decedents;
- (2) The probate of wills;
- (3) The persons and estates of minors;
- (4) Persons of unsound mind and their estates;
- (5) The determination of heirship or of adoption;
- (6) The restoration of lost wills and the construction of wills when incident to the administration of an estate; and
- (7) All such other matters as are provided by law.

**History.** Acts 1949, No. 140, §§ 4, 5; A.S.A. 1947, §§ 62-2004, 62-2005; Acts 2003, No. 1185, § 268.

## RESEARCH REFERENCES

**Ark. L. Rev.** Minimum Standards of Judicial Administration — Arkansas, 5 Ark. L. Rev. 1, 22.

Amendments of the Probate Code, 7 Ark. L. Rev. 377.

Conflict of Laws: Arkansas 1969-72, 27 Ark. L. Rev. 27.

## CASE NOTES

## ANALYSIS

Adoption.  
Authority of Court.  
Chancery Courts.  
Claims Against Estate.  
Closing of Estate.  
Collateral Attack.  
Dower.  
Enforcing Compromise Claim.  
Equitable Relief and Doctrines.  
Exhumation.  
Fees of Attorneys and Guardians.  
Gift Inter Vivos.  
Homestead.  
Jurisdiction and Powers Generally.  
Jurisdiction over Administrators.  
Jurisdiction Over Assets.  
Laches of Creditor.  
Lost Will.  
Partnership Accounts.  
Paternity.  
Power to Give Accounting.  
Proper Venue.  
Property Rights.  
Real Property.  
Rents.  
Sale of Realty.  
Title to Realty.  
Unborn Children.  
Vacating Judgment.

**Adoption.**

The probate court is vested with both inherent and statutory authority to close adoption records; a writ of prohibition will not lie to prevent a probate court from sealing adoption records. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994).

**Authority of Court.**

A probate court has authority, on a proper showing, to set aside any order that it makes at the same term of court. *Knight v. Worthen Bank & Trust Co.*, 233 Ark. 465, 345 S.W.2d 361 (1961).

In order to establish lost will, probate court must follow dictates of this section. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

**Chancery Courts.**

Chancery courts could interfere in guardians' settlements to correct fraud, or relieve against accident, or upon some other acknowledged ground of equity ju-

risdiction. *Nelson v. Cowling*, 77 Ark. 351, 91 S.W. 773 (1906) (decision under prior law).

A chancery court has no jurisdiction to probate wills or settle and distribute a decedent's estate even though a will has not been probated nor letters of administration issued. *Gaylor v. Gaylor*, 224 Ark. 644, 275 S.W.2d 644 (1955).

The distribution of assets contained in a deceased husband's testamentary marital trust need not pass through the wife's estate; the probate court acted properly by deferring the trust and distribution issues to the chancery court. *Clement v. Larkey*, 314 Ark. 488A, 314 Ark. 498, 863 S.W.2d 578 (1993).

**Claims Against Estate.**

It was not error for the probate court to grant the petition of administrator to grant a lien upon decedent's real estate and to revive a judgment allowing claims, as § 28-50-105 specifically permits an order allowing claims against an estate the effect of a judgment, and this section gives the probate court the same powers to carry out its judgments as exist in courts of general equity. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**Closing of Estate.**

While a probate court is not the proper forum to enforce contractual rights, where a contract provided for completion after close of administration and no action was being taken to close estate, it was proper to bring proceedings in the probate court to obtain a closing of the estate. *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959).

**Collateral Attack.**

In collateral proceeding attacking judgment of a probate court, every fact necessary to give the court jurisdiction will be conclusively presumed in favor of jurisdiction where the record is silent. *Redditt v. Hale*, 199 F.2d 386 (8th Cir. 1952), cert. denied, 345 U.S. 908, 73 S. Ct. 647 (1953).

The judgment of a probate court approving accounts of resident guardian of non-resident incompetents could not be attacked in collateral proceeding in federal district court where no fraud was charged, but only that resident guardian had not realized as much as should have been



realized. *Redditt v. Hale*, 199 F.2d 386 (8th Cir. 1952), cert. denied, 345 U.S. 908, 73 S. Ct. 647 (1953).

When a probate court has acted within its jurisdiction, its judgments are not open to collateral attack. When a probate court acts without its jurisdiction, however, its judgments are void and subject to collateral attack. *Filk v. Beatty*, 298 Ark. 40, 764 S.W.2d 454 (1989).

A judgment cannot be collaterally attacked unless it is void on the face of the record or the probate court is shown to have lacked subject-matter jurisdiction. *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

### **Dower.**

A probate court had jurisdiction in matters of dower. *Carter v. Younger*, 112 Ark. 483, 166 S.W. 547 (1914) (decision under prior law).

### **Enforcing Compromise Claim.**

A probate court had no jurisdiction to enforce a compromise of a ward's claim against an insurance company, such jurisdiction being in the circuit court. *Union Cent. Life Ins. Co. v. Boggs*, 188 Ark. 604, 66 S.W.2d 1077 (1934) (decision under prior law).

### **Equitable Relief and Doctrines.**

Probate courts were held to be without jurisdiction to confer equitable relief; however in probate matters properly brought before them they could apply equitable doctrines. *Jones v. Graham*, 36 Ark. 383 (1880) (decision under prior law).

### **Exhumation.**

Although not specifically enumerated in this section, an appellate court had jurisdiction over a request to exhume a body because the decedent's personal representative petitioned the probate division of the circuit court, during administration of the decedent's estate, to enforce a provision in the decedent's will by ordering exhumation and reburial and probate orders were appealable pursuant to § 28-1-116(a) and Ark. R. App. P. Civ. 2(a)(12). *Long v. Alford*, 2010 Ark. App. 233, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 319 (Apr. 14, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 403 (Aug. 6, 2010).

### **Fees of Attorneys and Guardians.**

A probate court had no jurisdiction of a claim by an attorney for services in prosecution of claim in behalf of an estate. *Pike v. Thomas*, 62 Ark. 223, 35 S.W. 212 (1896); *Parker & Parker v. Mayo*, 72 Ark. 513, 83 S.W. 324 (1904) (decision under prior law).

A probate court had no jurisdiction to audit claim against administrator for heirs' attorney's fee. *Paget v. Brogan*, 67 Ark. 522, 55 S.W. 938 (1900) (decision under prior law).

Probate courts could authorize the employment of counsel by the administrator and could allow fees for such services rendered as necessary expenses of administration. *Paget v. Brogan*, 67 Ark. 522, 55 S.W. 938 (1900) (decision under prior law).

Where the term at which fees of an attorney and a guardian had been ordered was allowed to lapse, the executor could not have an order allowing the fees set aside except by filing a petition which complied with the requirements of former Arkansas Statutes Annotated §§ 29-506 and 29-508. *Hobbs v. Dowds*, 233 Ark. 501, 345 S.W.2d 925 (1961).

### **Gift Inter Vivos.**

A probate court was without jurisdiction to decide the ownership of jewelry claimed as a gift inter vivos from the testator. *Huff v. Hot Springs Savs., Trust & Guar. Co.*, 185 Ark. 20, 45 S.W.2d 508 (1932) (decision under prior law).

### **Homestead.**

A probate court had jurisdiction to order sale of decedent's homestead. *Huffstедler v. Kibler*, 67 Ark. 239, 54 S.W. 210 (1899) (decision under prior law).

A probate court had no jurisdiction of an action by a widow against the heirs of her deceased husband to recover a homestead of which they were in adverse possession. *James v. James*, 72 Ark. 329, 80 S.W. 148 (1904) (decision under prior law).

### **Jurisdiction and Powers Generally.**

A probate court had only such jurisdiction as was conferred by statute and the Arkansas Constitution. *Lewis v. Rutherford*, 71 Ark. 218, 72 S.W. 373 (1903) (decision under prior law).

The jurisdiction of probate courts was limited in its general scope as to the subject matter to the undisputed property of decedents and of wards, and, as to



persons, to those interested in such property as equitably or legally entitled to some distributive share therein, or in the residue, and as to creditors who voluntarily, upon general notice and without special citation, present their claims. *Huff v. Hot Springs Savs., Trust & Guar. Co.*, 185 Ark. 20, 45 S.W.2d 508 (1932) (decision under prior law).

The probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or necessarily incidental to the exercise of the jurisdiction and powers specifically granted. *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984).

Lost or destroyed wills are generally established by an action in chancery, but probate court has additional jurisdiction in matters of heirship, adoption, and, concurrent with jurisdiction of other courts, jurisdiction to restore lost wills and for the construction of wills when incident to the administration of an estate. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

Neither the Arkansas Constitution nor this section confers on probate courts jurisdiction to administer a trust created by a will. *Clement v. Larkey*, 314 Ark. 488A, 314 Ark. 498, 863 S.W.2d 578 (1993).

The construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity; neither the Arkansas Constitution nor this section confers on probate courts jurisdiction to administer a trust created by a will. *Long Trust v. Holk*, 315 Ark. 112, 864 S.W.2d 869 (1993).

The probate court had subject matter jurisdiction to determine title to the real property where the appellant was a beneficiary of the testator's will, even though appellant was not acting in that capacity by asserting her claim to this property. *Williams ex rel. Tucker v. Titterington*, 46 Ark. App. 322, 881 S.W.2d 226 (1994).

Generally speaking, lost or destroyed wills are established by an action in chancery under § 28-40-301; however, subdivision (a)(6) of this section grants probate court jurisdiction (concurrent with the jurisdiction other courts) over the restoration of lost wills and for the construction of wills when incident to the administration of an estate. *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994).

### **Jurisdiction over Administrators.**

A probate court could render summary judgment on an administrator's bond for the payment of assets found to be in his hands and which it had ordered to be paid over. *Planters' Mut. Ins. Ass'n v. Harris*, 96 Ark. 222, 131 S.W. 949 (1910) (decision under prior law).

A probate court had jurisdiction to set aside administrator's sale and to remove administrator. *Hall v. Cox*, 104 Ark. 303, 149 S.W. 80 (1912) (decision under prior law).

### **Jurisdiction Over Assets.**

The jurisdiction of the probate court over the estates of deceased persons was held to be confined to the administration of assets which came under its control and, incidentally, to compel the discovery of assets. *Shane v. Dickson*, 111 Ark. 353, 163 S.W. 1140 (1914) (decision under prior law).

A probate court had jurisdiction to require an executor to disclose assets of the estate, including what, if anything, he owed the estate on notes or otherwise and to require him to charge himself with any amount he may have wrongfully paid to himself or to others without presenting the claim to the court for allowance. *Gocio v. Seamster*, 203 Ark. 937, 160 S.W.2d 194 (1942) (decision under prior law).

Probate court did not have jurisdiction over suit by administrator of the estate to collect a debt alleged to be due to the estate by the defendant, where defendant was not an heir, distributee, or beneficiary, and was a third person or stranger to the estate. *Estate of Puddy v. Gillam*, 785 S.W.2d 254 (1990).

### **Laches of Creditor.**

A probate court had jurisdiction to determine whether or not creditors had, by laches, lost the right to subject the real estate of the decedent to the payment of their debts. *Brogan v. Brogan*, 63 Ark. 405, 39 S.W. 58 (1897) (decision under prior law).

### **Lost Will.**

A probate court had no jurisdiction to establish a lost will. *Waggener v. Lyles*, 29 Ark. 47 (1874) (decision under prior law).

Jurisdiction was proper in probate court where the proceedings were to restore a lost will incident to the administration of

an estate. *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994).

### **Partnership Accounts.**

A probate court had no jurisdiction to adjust the partnership accounts between deceased and surviving partners. However, where the accounts had been settled and a balance struck against a deceased partner, the probate court could render judgment for this balance against the estate. *Culley & Son v. Edwards*, 44 Ark. 423 (1884). See also *Morris v. Stroude*, 123 Ark. 313, 185 S.W. 451 (1916) (decision under prior law).

### **Paternity.**

Where sole purpose of action is to establish paternity, the probate court is without jurisdiction to hear the matter. In re Estate of F.C., 321 Ark. 191, 900 S.W.2d 200 (1995).

### **Power to Give Accounting.**

Where a probate judge dismissed a petition for an accounting filed by an executor and a third party complaint filed by the widow and the dismissals were without prejudice to have the matters heard in the chancery court, the dismissals were not clearly erroneous, since the chancery court had the power to give an accounting even though it could have been had in the probate court where the matter was pending. *Stokes v. Stokes*, 275 Ark. 110, 628 S.W.2d 6 (1982).

### **Proper Venue.**

In action by devisee for possession of motel devised to her for life against executors of will, the probate court of the county was court of competent jurisdiction to hear and determine the question of possession where the property was located in the county and ancillary administration of deceased's estate was being conducted there under the supervision of the probate court. *Sides v. Haynes*, 181 F. Supp. 889 (W.D. Ark. 1960).

### **Property Rights.**

The enactment of the Probate Code did not enlarge the jurisdiction of probate courts to hear contests over property rights between the personal representative and third persons. *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976).

The probate courts have no jurisdiction to resolve disputes as to property rights

between a personal representative and third persons claiming adversely to the estate; persons who are neither heirs, devisees, distributees, nor beneficiaries of the estate are third persons and "strangers" within the meaning of this rule. *Williams ex rel. Tucker v. Titterington*, 46 Ark. App. 322, 881 S.W.2d 226 (1994).

### **Real Property.**

Under § 28-49-101 real property is an asset in the hands of the administrator only when the probate court finds that it should be sold, mortgaged, leased, or exchanged for purposes stated in § 28-51-103. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

### **Rents.**

Probate court had no jurisdiction to adjudicate a claim by a widow against the administrator of her husband's estate for rents due her which were collected by the administrator. *Mobley v. Andrews*, 55 Ark. 222, 17 S.W. 805 (1891) (decision under prior law).

### **Sale of Realty.**

Probate courts had jurisdiction to order the sale of real estate to pay the debts of an estate in accordance with the jurisdiction conferred by this section. *Sullivan v. Times Publishing Co.*, 181 Ark. 27, 24 S.W.2d 865 (1930) (decision under prior law).

### **Title to Realty.**

A probate court had no jurisdiction to try title to real property. *Fancher v. Kenner*, 110 Ark. 117, 161 S.W. 166 (1913); *Fowler v. Frazier*, 116 Ark. 350, 172 S.W. 875 (1915); *Moss v. Moose*, 184 Ark. 798, 44 S.W.2d 825 (1931) (decision under prior law).

### **Unborn Children.**

Since nothing is said about unborn children in Ark. Const., Art. 7, § 34, concerning probate courts or in this section, which is the statutory jurisdictional provision, any attempt to extend the Probate Code to unborn children would be without specific authority and would be void. Accordingly, a probate court is correct in refusing to grant letters of administration to a deceased fetus. *Carpenter v. Logan*, 281 Ark. 184, 662 S.W.2d 808 (1984).

### **Vacating Judgment.**

A probate court was without jurisdiction to vacate its judgment probating a will,



such judgment being final. *Dunn v. Bradley*, 175 Ark. 182, 299 S.W. 370 (1927) (decision under prior law).

**Cited:** *Ozment v. Mann*, 235 Ark. 901, 363 S.W.2d 129 (1962); *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *McDermott v. McAdams*, 273 Ark. 20, 616 S.W.2d 476 (1981); *Hutton v. Savage*, 298

Ark. 256, 769 S.W.2d 394 (1989); *Hall v. Superior Fed. Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990); *In re D.J.M.*, 39 Ark. App. 116, 839 S.W.2d 535 (1992); *Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997); *Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003).

## 28-1-105. [Repealed.]

**Publisher's Notes.** This section, concerning the jurisdiction of probate judges, was repealed by Acts 2003, No. 1185,

§ 269. The section was derived from Acts 1949, No. 140, § 4; A.S.A. 1947, § 62-2004.

## 28-1-106. Referees and probate clerks.

(a) Circuit courts shall have the authority to appoint referees in probate in the respective counties in the manner and with the powers and duties as provided by Supreme Court rule.

(b)(1) In the absence of the circuit judge or a referee within a county, the probate clerk of the circuit court may appoint administrators, executors, guardians, and curators and shall approve the bond of the appointees.

(2) However, the appointment of administrators, executors, guardians, and curators and the approval of their bond shall be subject to review by the court.

(c)(1) The probate clerk of the circuit court shall be the custodian of all probate records and documents and shall have the power either in person or by deputy to:

- (A) Take acknowledgments;
- (B) Administer oaths;
- (C) Issue notices and process;

(D) Certify copies of instruments, documents, and records of the court; and

(E) Perform the usual functions of his or her office and other functions as may be authorized by law.

(2) All original papers, when filed, shall be retained in the custody of the clerk except when otherwise ordered by a court of competent jurisdiction.

(d) The probate clerk of the circuit court shall be the custodian of all adoption records and documents.

**History.** Acts 1949, No. 140, §§ 6, 8; 1953, No. 165, § 1; A.S.A. 1947, §§ 62-2006, 62-2008; Acts 1993, No. 758, § 1; 2003, No. 1185, § 270.

**Cross References.** Probate clerk to notify Revenue Division of the Department of Finance and Administration of appointment, § 26-59-120.

## RESEARCH REFERENCES

**Ark. L. Rev.** Amendments of the Probate Code, 7 Ark. L. Rev. 377.

## CASE NOTES

### Special Action.

This section does not prohibit the judge in a special action from receiving documents in open court, without the interven-

tion of the clerk of court and with the receipt of the documents constituting their "filing." *Orlando v. Wizel*, 443 F. Supp. 744 (W.D. Ark. 1978).

### 28-1-107. [Repealed.]

**Publisher's Notes.** This section, concerning court reporters, was repealed by Acts 2003, No. 1185, § 271. The section

was derived from Acts 1949, No. 140, § 14; A.S.A. 1947, § 62-2014.

### 28-1-108. Records.

The following records of the court shall be maintained:

(1) An index in which files pertaining to estates of deceased persons shall be indexed under the name of the decedent, and those pertaining to guardianships under the name of the ward. The file and docket number shall be shown after the name of each file;

(2) A docket in which shall be listed in chronological order under the name of the decedent or ward all documents filed or issued and all orders made pertaining to the estate, including:

(A) The dates thereof;

(B) The names and addresses of fiduciaries and of attorneys for parties in interest when and as known to the clerk;

(C) Reference to the volume and page of any record which shall have been made of the document or order; and

(D) Other data as the court may direct;

(3) A record of wills, properly indexed, in which shall be recorded all wills admitted to probate with the certificate of probate thereof;

(4) Other records as may be required by law or the court.

**History.** Acts 1949, No. 140, § 9; 1983, No. 250, § 1; A.S.A. 1947, § 62-2009.

### 28-1-109. Petition — Verification.

(a) Unless otherwise provided, every application to the court shall be by petition signed and verified by or on behalf of the petitioner.

(b) This requirement shall be mandatory but not jurisdictional, and noncompliance therewith shall not alone be grounds for appeal.

**History.** Acts 1949, No. 140, § 10; A.S.A. 1947, § 62-2010.

## CASE NOTES

**Application to Court.**

An application to the court within the meaning of § 28-40-103 was made when proponents of a will filed a verified petition for probate within three days after

death of testator, and a personal appearance before the probate court was not necessary. *Minchew v. Tullis*, 236 Ark. 818, 368 S.W.2d 282 (1963).

**28-1-110. Filing objections to petition.**

(a) On or before the day set for hearing, an interested person may file written objections to a petition previously filed.

(b) Upon special order or general rule of the court, objections to a petition must be filed in writing as a prerequisite to being heard by the court.

**History.** Acts 1949, No. 140, § 11; A.S.A. 1947, § 62-2011.

## CASE NOTES

## ANALYSIS

Response.  
Rules of Procedure.

**Response.**

Where there is no order or rule, a court does not err in permitting appellees to dictate a response into the record, for this section requires objections to a petition to be filed in writing only when the court so requires by a special order or general rule. *Coogler v. Dorn*, 231 Ark. 188, 328 S.W.2d 506 (1959).

**Rules of Procedure.**

Where a petition for determination of heirship under § 28-53-101 was filed in

July 1980, and the executor filed his response in September 1980, beyond the 20-day period provided for in ARCP 12, but before the hearing, it was proper for the probate judge to deny petitioner's motion to strike the response, since objections by the defendant are not governed by ARCP 12, in probate proceedings and may be made at any time, up to and including the day of the hearing, unless a special order or general rule of the court under this section requires a written objection as a prerequisite to the arguments being heard by the court. *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981).

**28-1-111. Guardians and attorneys ad litem.**

(a) Circuit courts shall have the power and duty to appoint a guardian ad litem to a proceeding to represent an incompetent party who is not represented by a guardian or next friend and, for the protection of the interests of a nonresident party who is not represented before the court and has not been personally served with notice, to appoint an attorney ad litem to give notice to the nonresident of the pendency and nature of the proceeding as is provided by law with respect to proceedings in courts of equity.

(b) The appointment of a guardian ad litem or attorney ad litem may be made by the clerk of the court at any time after the initiation of a proceeding by the filing of a petition, subject to the approval of the court.



**History.** Acts 1949, No. 140, § 4; A.S.A. 1947, § 62-2004.

## CASE NOTES

### ANALYSIS

Accounting Against Guardian.  
Convicted Felon.  
Determination of Mental Status.  
Unable to Challenge Appointment.

#### Accounting Against Guardian.

Where a person for whom a guardian was appointed as being insane was subsequently adjudged to be sane, a suit for an accounting against the guardian was not within the exclusive jurisdiction of the probate court, but could be maintained in the chancery court. *Smith v. Walker*, 187 Ark. 161, 58 S.W.2d 946 (1933) (decision under prior law).

#### Convicted Felon.

Probate court had no jurisdiction of a proceeding to determine the issue of a convicted felon's sanity where he was in custody of the law for execution. *Ferguson v. Martineau*, 115 Ark. 317, 171 S.W. 472 (1914) (decision under prior law).

#### Determination of Mental Status.

In suit to redeem property sold for delinquent taxes, a chancery court had au-

thority to determine plaintiff's mental status, irrespective of any previous adjudication by the probate court, which would be prima facie evidence. *Schuman v. Westbrook*, 207 Ark. 495, 181 S.W.2d 470 (1944) (decision under prior law).

#### Unable to Challenge Appointment.

Because an attorney-ad-litem had performed the services requested by a circuit court and the circuit court had already rendered a ruling in the case, an attorney's argument on appeal that the circuit court lacked authority to appoint an attorney-ad-litem in a case involving a petition for ante-mortem probate was moot. *Sanford v. Murdoch*, 374 Ark. 12, 285 S.W.3d 620 (2008).

**Cited:** *Ozment v. Mann*, 235 Ark. 901, 363 S.W.2d 129 (1962); *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *McDermott v. McAdams*, 273 Ark. 20, 616 S.W.2d 476 (1981).

## 28-1-112. Notice — Service — Proof — Costs.

(a) **WHEN NOTICE TO BE GIVEN.** Notice to interested persons need be given only when and as specifically provided for in the Probate Code or as ordered by the court. When no notice is required by the Probate Code, the court, by rule or by order in a particular case, may require such notice as it deems desirable.

(b) **KINDS OF NOTICE REQUIRED.** Unless waived and except as otherwise provided by law, and subject to rule of the court or order of the court in a particular case specifying which of the following types of service shall be employed, notices required by the Probate Code may be served either:

(1) By delivering a copy personally to a person, if a natural person, and, if a corporation or a partnership, by delivering a copy to an individual upon whom civil process may be legally served in behalf of the corporation or partnership at least ten (10) days prior to the date set for the hearing;

(2) By leaving a copy at the usual place of abode of the person being served with some person over fifteen (15) years of age who is a member of his or her family, the notice to be served by an officer authorized to

serve process in civil actions at least ten (10) days prior to the date set for the hearing;

(3) By registered mail, requesting a return receipt signed by addressee only, addressed to the person to be served located in the United States at his or her address stated in the petition for the hearing, to be posted by depositing in any United States Post Office in this state at least fifteen (15) days prior to the date set for the hearing;

(4)(A) By publishing one (1) time a week for two (2) consecutive weeks in a newspaper published and having a general circulation in the county, with the first day of publication to be at least fifteen (15) days prior to the date set for the hearing.

(B) In addition, when service by publication only is employed, all persons whose names and addresses appear in the petition shall be served by ordinary mail, bearing on the envelope the return address of the clerk, in the same time and manner as provided in subdivision (b)(3) of this section with respect to notice by registered mail, except that no registration shall be required;

(5) By any combination of two (2) or more of the methods set out in subdivisions (b)(1)-(4) of this section; or

(6) By any method of service allowed by the Arkansas Rules of Civil Procedure.

(c) BY WHOM PREPARED, SIGNED, AND SERVED.

(1) Except when by statute or by order of the court otherwise expressly provided, a notice in a probate proceeding shall be in writing or print and prepared by or by procurement of the party upon whom rests the burden of giving the notice and shall be signed by the clerk or the attorney for the party upon whom rests the burden of giving notice. If service is to be by mail, the person preparing the notice shall sign it or deliver it to the clerk properly prepared for the clerk's signature.

(2)(A) In the case of notices served by registered or certified mail, the clerk or the attorney of record in a probate proceeding for the party upon whom rests the burden of giving notice pursuant to this section may deposit the notices in the United States mail, cause the receipts for the delivery of the certified or registered mail to be returned to the clerk or the attorney, and duly prove service by the execution and filing with the clerk of the statement prescribed in subsection (f) of this section.

(B) Personal service may be made in any part of this state and, except as provided by subdivision (b)(2) of this section, may be made by any person not an incompetent.

(d) SERVICE UPON AN INCOMPETENT PERSON. Except when otherwise expressly provided by statute with reference to a particular proceeding, notice to an incompetent person shall be served as follows:

(1) Upon the guardian, if any, of the estate of the incompetent person if the proceedings affect his or her estate, and upon the guardian, if any, of the person of the incompetent person if the proceedings affect the control or custody of his or her person;



(2) If there is no guardian of the estate or of the person upon whom notice may appropriately be served, service shall be upon the incompetent person, except:

(A) If he or she is a minor under fourteen (14) years of age, service shall be upon the parent, or person in loco parentis, having custody or control of the minor;

(B) If he or she is mentally incompetent and is confined in a hospital or institution for the treatment or care of mentally incompetent persons, service shall be upon the superintendent or acting superintendent of the hospital or institution. It shall be the superintendent's duty to promptly deliver or communicate the notice to the incompetent person; or

(C) If he or she is a mentally incompetent person who is not confined in a hospital or institution for the treatment or care of mentally incompetent persons, but is in the care or under the control of a spouse of the incompetent person or of a person related to the incompetent person within the third degree of consanguinity, then service may be upon the spouse or near relative whose duty it shall be to deliver or communicate the notice to the incompetent person; and

(3) In proceedings in which the interests of the incompetent person are adverse to the interests of his or her guardian, notice shall be served upon the incompetent person as provided in cases in which there is no guardian.

(e) **SERVICE ON ATTORNEY.** If there is an attorney of record for a party in a proceeding or matter pending in the court, all notices required to be served on the party in the proceeding or matter shall be served on the attorney, and this service shall be in lieu of service upon the party for whom the attorney appears.

(f) **PROOF OF SERVICE.**

(1) Proof of service of notice, otherwise than by publication in a newspaper or posting, shall be made by filing with the clerk a copy of the notice which has endorsed thereon a statement naming the person or persons upon whom it was served, the time, place, and manner of service, and is signed by the person who served the notice. This certificate of notice shall be sworn to unless signed by an officer authorized by law to serve civil process, or signed by the clerk or by an attorney of this state.

(2) In the case of service by registered mail, the return receipt shall be attached to the proof of service if a receipt has been received. If no receipt has been received, the court, in its discretion, may order further service on the party.

(g) **PROOF OF PUBLICATION.** When notice by publication in a newspaper or by posting is required by the Probate Code or by the court, proof thereof shall be made as provided by law in civil proceedings.

(h) **COSTS OF NOTICE.** All expense incurred in giving notice under the provisions of the Probate Code shall be taxed as costs in the proceeding.

**History.** Acts 1949, No. 140, § 12; 2012; Acts 1995, No. 734, § 1; 2001, No. 1951, No. 255, § 2; A.S.A. 1947, § 62- 240, § 1.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

## RESEARCH REFERENCES

**Ark. L. Rev. Probate Code Amendments,** 5 Ark. L. Rev. 377.

Notices under the Probate Code, 8 Ark. L. Rev. 324.

## CASE NOTES

### ANALYSIS

Not Entitled to Notice.  
Substantial Compliance.  
Unable to Challenge Appointment.  
Voluntary Submission to Jurisdiction.

#### Not Entitled to Notice.

Although appellant argued that there was no evidence that anyone received notice of the hearing set on the final accounting, which appellant claimed violated this section, the argument was without merit, given the notices that the trial court sent out after excluding appellant from distribution of the estate, and appellant conceded to having received actual notice in any event and possibly not having been entitled to notice in the first place; because appellant had been excluded, she was not an interested person under § 28-1-102(11) and so there was no legal requirement that she be served notice, and she lacked standing to complain about the failure to send notice to others who had not appealed. *Seymour v. Biehslich*, 371 Ark. 359, 266 S.W.3d 722 (2007).

#### Substantial Compliance.

Substantial compliance with the requirements of law for the presentation of claims is sufficient. *Merritt v. Rollins*, 231 Ark. 384, 329 S.W.2d 544 (1959).

There was substantial compliance with this section where, though county clerk did not notify executor of claim against estate by registered mail as provided by § 28-50-104, her attorney received a copy of the claim within the statutory period

for notice. *Edwards v. Brimm*, 236 Ark. 588, 367 S.W.2d 433 (1963).

On the question of whether service on a court-appointed attorney for an absent military mother was sufficient service of process in a case of continuing jurisdiction on the issues of custody and guardianship, it was undisputed that service was made on the mother's attorney of record, and thus, the service of notice was in compliance with subsection (e) of this section. *Finney v. Cook*, 351 Ark. 367, 94 S.W.3d 333 (2002).

#### Unable to Challenge Appointment.

Issue raised by an attorney regarding violation of his due-process rights allegedly resulting from a circuit court's appointment of an attorney-ad-litem without notice, without a hearing, and without adequate time to respond would have had no practical effect on the controversy, would have been purely advisory, and was moot because the attorney-ad-litem had performed the services requested by the circuit court and the circuit court had already rendered a ruling in the case. *Sanford v. Murdoch*, 374 Ark. 12, 285 S.W.3d 620 (2008).

#### Voluntary Submission to Jurisdiction.

A party contesting a will voluntarily submitted to the jurisdiction of the probate court by requesting in writing that notice by ordinary mail of any petition, motion, or other filing of any kind be sent to his attorney. *Gibbins v. Hancock*, 267 Ark. 298, 590 S.W.2d 280 (1979).

**Cited:** *Burdette v. Dietz*, 18 Ark. App. 107, 711 S.W.2d 178 (1986).

## 28-1-113. Waiver of notice.

(a) A person who submits to the jurisdiction of the court in any hearing shall be deemed to have waived notice.



(b) A waiver in writing, executed in person or by attorney, in behalf of a person who is interested in a hearing in a probate proceeding, shall be effective if made by:

(1) A legally competent person in his or her own behalf;

(2) The guardian of the estate of an incompetent person in behalf of his or her ward, unless the interests of the ward and the guardian in the hearing are adverse;

(3) An incompetent person in his or her own behalf if the interests of the guardian and the ward in the hearing are adverse, or if there is no guardian;

(4) Either parent in behalf of a minor child, if the child is under fourteen (14) years of age and in the actual custody of the parent, or the minor child in his or her own behalf if the minor child has attained fourteen (14) years of age;

(5) A guardian ad litem in behalf of an incompetent person;

(6) A trustee in behalf of a beneficiary of his or her trust; or

(7) A consul or other representative of a foreign government whose appearance has been entered as provided by law in behalf of a person residing in a foreign country.

(c) A waiver, executed by a competent person in his or her own behalf or by his or her attorney, by its terms, may include one (1) or more hearings in a particular probate proceeding.

**History.** Acts 1949, No. 140, § 13; 1951, No. 255, § 3; 1975, No. 620, § 8; A.S.A. 1947, § 62-2013.

## RESEARCH REFERENCES

**Ark. L. Rev. Probate Code Amendments,** 5 Ark. L. Rev. 377.

**Notices under the Probate Code,** 8 Ark. L. Rev. 324.

## CASE NOTES

### ANALYSIS

**Personal Waiver.**

**Voluntary Submission to Jurisdiction.**

### Personal Waiver.

Personal waiver of successor guardian who was not a party to the action, in her own behalf, did not bar the guardian from challenging the order on behalf of ward where her personal waiver was executed prior to her appointment as successor

guardian. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988).

### Voluntary Submission to Jurisdiction.

A party contesting a will voluntarily submitted to the jurisdiction of the probate court by requesting in writing that notice by ordinary mail of any petition, motion, or other filing of any kind be sent to his attorney. *Gibbins v. Hancock*, 267 Ark. 298, 590 S.W.2d 280 (1979).

## 28-1-114. [Repealed.]

**Publisher's Notes.** This section, concerning rules of procedure and forms for probate courts, was repealed by Acts 2003,

No. 1185, § 272. The section was derived from Acts 1949, No. 140, §§ 4, 7; A.S.A. 1947, § 62-2007.



**28-1-115. Vacation and modification of orders.**

(a) For good cause and at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify an order or grant a rehearing. However, no such power shall exist as to any order from which an appeal has been taken or to set aside the probate of a will after the time allowed for contest thereof.

(b) No vacation or modification under this section shall affect any act previously done or any right previously acquired in reliance on such an order or judgment.

**History.** Acts 1949, No. 140, § 15;  
A.S.A. 1947, § 62-2015.

**CASE NOTES****ANALYSIS**

Purpose.

Dismissal with Prejudice.

Good Cause.

Right of Appeal.

Time.

**Purpose.**

This section was designed to afford a probate court greater flexibility with regard to the finality of its orders in the process of administration of an estate. *White v. Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992).

Probate court did not err in reopening a decedent's estate in order to reform the probate file and a deed to show that real property was conveyed to purchasers with a reservation of one-half the mineral rights on each tract of land because the president of the bank that administered the estate testified that one-half of the mineral rights were not to be sold to purchasers, and his testimony was supported by the evidence; this section was inapplicable and did not limit § 28-53-119 because this section did not speak to reopening the estate, which was authorized by § 28-53-119. *Moore v. First Presbyterian Church of Searcy, Ark., Inc.*, 2010 Ark. App. 269, — S.W.3d — (2010), rehearing denied, *Moore v. First Presbyterian Church of Searcy Ark., Inc.*, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 415 (May 5, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 487 (Oct. 21, 2010).

**Dismissal with Prejudice.**

The probate court's dismissal of will contest was necessarily with prejudice; any reconsideration of the dismissal must therefore relate to the dismissal itself and not to the merits of the will contest. *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991).

**Good Cause.**

Good cause to vacate previous order of court to sell property to pay claim exists where claim is barred by lapse of time under § 28-50-101. *Brooks v. Baker*, 242 Ark. 128, 412 S.W.2d 271 (1967).

Where a contest of will had already been filed at time will was admitted to probate, there was no time period in which contest had to be filed, and court could vacate or modify its order admitting will to probate, for good cause, at any time within period allowed for appeal after final termination of administration of estate. Even if court had felt admitting will to probate was res judicata on validity of will, it could have vacated its order because probate case was still open. *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987).

The record was void of any evidence for appellate review of whether good cause existed to vacate dismissal of will contest pursuant to subsection (a) where appellant offered no explanation of why "newly discovered" evidence was not offered prior to dismissal. *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991).

Probate judge did not err in failing to find good cause to vacate order, which had

found woman to be natural daughter of decedent, on basis of newly discovered evidence that woman was not natural daughter of decedent where there was no satisfactory explanation offered to show why this evidence could not have been obtained prior to entry of the order. *Cobb v. Estate of Keown*, 53 Ark. App. 171, 920 S.W.2d 501 (1996).

#### **Right of Appeal.**

The fact that appellant did not appeal from an order under the commissioner's report as to the value of homestead under the provisions of § 28-39-203, prior to the probate court's final order, even though they might have done so, did not constitute a bar to a later appeal. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

#### **Time.**

Notwithstanding the provisions of ARCP 60, subsection (a) allows a probate court to vacate or modify its orders at any time before the time for appeal has

elapsed after the final termination of the estate. *White v. Toney*, 37 Ark. App. 36, 823 S.W.2d 921 (1992).

A probate order may be vacated or modified at any time before a final order is entered, notwithstanding the dictates of Ark. R. Civ. P. Rule 60(b). *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000).

In accordance with Ark. R. Civ. P. 81, it is precisely because the probate code and the Arkansas Rules of Civil Procedure set forth different time limits on the court's authority to modify or vacate prior orders that this section applies in probate proceedings; thus, an appeal under § 28-1-116 was timely since Ark. R. Civ. P. 52 was not implicated in an appeal from a denial of reconsideration arising from a denial of intervention in a probate case. *Helena Reg'l Med. Ctr. v. Wilson*, 362 Ark. 117, 207 S.W.3d 541 (2005).

**Cited:** *Alexander v. First Nat'l Bank*, 278 Ark. 406, 646 S.W.2d 684 (1983).

### **28-1-116. Appeals.**

(a) **APPEAL PERMITTED.** Except as provided in subsection (b) of this section, a person aggrieved by an order of the circuit court in probate proceedings under the provisions of the Probate Code may obtain a review of the order by the Supreme Court or the Court of Appeals.

(b) **ORDERS WHICH ARE NOT APPEALABLE.** There shall be no appeal from an order:

(1) Removing a fiduciary for failure to give a new bond or to render an account as required by the court; or

(2) Appointing a special administrator.

(c) **STAY OF APPEAL.**

(1) When an appeal is taken with respect to any appealable order in the administration of a decedent's estate made prior to the order of final distribution, other than an order admitting or denying the probate of a will or appointing or refusing to appoint a personal representative, the circuit court or appellate court, in its discretion, may order that the appeal be:

(A) Stayed until the order of final distribution is made; and

(B) Heard only as a part of any appeal which may be taken from the order of final distribution.

(2) This subsection shall not apply to guardianships.

(d) **WHEN APPEAL FROM ORDER OF FINAL DISTRIBUTION INCLUDES APPEAL FROM PRIOR ORDERS.** When an appeal is taken from the order of final distribution in the administration of a decedent's estate, all prior appealable orders and judgments to which the appellant has filed objections in writing within sixty (60) days after the order of judgment was rendered and from which an appeal has not been taken, except orders admitting



or denying the probate of a will or appointing a personal representative, shall be reviewed at the election of the appellant. The appellant shall indicate the election by clearly stating in the appeal the orders which he or she desires to have reviewed.

(e) **STAY.**  
(1) An appeal shall stay other proceedings in the circuit court except when and to the extent that the court finds that no interested person will be prejudiced and by order permits other proceedings to be had.

(2) An order granting an allowance to the widow of minor children of a decedent pending settlement of the estate or setting apart exempt personal property to them shall not be stayed by an appeal.

(f) **WHEN FIDUCIARY NOT REQUIRED TO GIVE SUPERSEDEAS BOND.** No supersedeas bond shall be required of a fiduciary when, in any probate matter, he or she appeals on behalf of his or her ward or the estate.

(g) **APPLICABILITY OF GENERAL APPELLATE RULES.**  
(1) Except as otherwise provided in the Probate Code, the provisions as to time, manner, notice, appeal bonds, stays, scope of review, duties of the clerk, and all other matters relating to appellate review shall be determined by the law and rules applicable to appeals in equity cases.

(2) The transcript on appeal shall be compiled in the same manner and consist of the same material as prescribed by law for appeals in equity cases.

**History.** Acts 1949, No. 140, § 16; A.S.A. 1947, § 62-2016; Acts 2003, No. 1185, § 273.  
**A.C.R.C. Notes.** Acts 2003, No. 1885, § 273, purported to amend this section in its entirety, but did not set out subsections (f) and (g) as expressly repealed. The Arkansas Code Revision Commission does not construe the omission of subsections

(f) and (g) by Acts 2003, No 1885, § 273, as an implied repeal of those subsections. Accordingly, subsections (f) and (g) have been included in this section as set out above.  
**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

RESEARCH REFERENCES

**Ark. L. Rev.** Minimum Standards of Judicial Administration — Arkansas, 5 Ark. L. Rev. 1, 22.

CASE NOTES

ANALYSIS	Removal of Executor.
Applicability.	Scope of Review.
Adoption Proceedings.	Special Administrator.
Aggrieved Person.	Stay.
Authority.	Time for Appeal.
Evidence.	Untimely Appeal.
Exhumation.	Written Objection.
Incompetency Determination.	<b>Applicability.</b>
Order of Court Binding.	This section provides for appeals from probate causes involving wills, estates, and fiduciary relationships; it was enacted
Order of Final Distribution.	

in 1949 and was in effect at the time ARAP 2 was adopted and, therefore, determines whether there is a right of appeal in a case involving orders of the probate court. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

Law and rules applicable to appeals from equity courts apply equally to appeals from probate court, except as otherwise provided in the probate code. In *re Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995).

Right to review by the Supreme Court lies from all probate court orders other than an order removing a fiduciary for failure to give a new bond or render an accounting required by the court, or an order appointing a special administrator. In *re Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995).

Because a right to review lies from all probate orders other than an order removing a fiduciary for failure to give bond or to render a required accounting or an order appointing a special administrator under subsections (a) and (b) of this section, claimant's appeal from the order denying the motion to enter an order was properly before the court. *Smith v. Estate of Howell*, 372 Ark. 186, 272 S.W.3d 106 (2008).

### **Adoption Proceedings.**

In adoption proceedings, appellate court reviews the record de novo, but will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. *Chrisos v. Egleston*, 7 Ark. App. 82, 644 S.W.2d 326 (1983).

### **Aggrieved Person.**

Where the plaintiffs filed an action against the administrator prior to his resignation as administrator, plaintiffs were interested parties within the meaning of subdivision (11) of § 28-1-102 and aggrieved parties within the meaning of this section for purposes of appealing from probate orders that affected those proceedings, but as such a resignation was ordinarily a matter of discretion for the probate judge and, as such resignation had no effect on venue and § 28-48-107 gave plaintiffs a remedy for the appointment of another administrator, there was no abuse of discretion in allowing the resignation to stand. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

### **Authority.**

Circuit court did not err in appointing a sister as guardian over her sibling, an incapacitated adult, because the circuit court acted with its authority when it continued to enter orders while a brother's appeal was pending; the circuit court faced changed circumstances that called for immediate action because it was grappling with a situation in which the terms of its orders had not been fulfilled, and subdivision (e)(1) of this section did not preclude the circuit court from exercising that kind of judicial authority. *Kuelbs v. Hill*, 2010 Ark. App. 793, — S.W.3d — (2010).

Because a guardianship case, like a child-custody or child-support case, involves ongoing events in the life of a person who is dependent on the court for protection, the court must continually exercise its powers, where changed conditions warrant, to safeguard those persons whose needs cannot wait a year or more while an appeal makes its way through the courts. *Kuelbs v. Hill*, 2010 Ark. App. 793, — S.W.3d — (2010).

### **Evidence.**

Since an appellate review is de novo under the provisions of subsection (g) of this section, improperly excluded evidence will be considered. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

### **Exhumation.**

Although not specifically enumerated in § 28-1-104, an appellate court had jurisdiction over a request to exhume a body because the decedent's personal representative petitioned the probate division of the circuit court, during administration of the decedent's estate, to enforce a provision in the decedent's will by ordering exhumation and reburial and probate orders were appealable pursuant to subsection (a) of this section and Ark. R. App. P.-Civ. 2(a)(12). *Long v. Alford*, 2010 Ark. App. 233, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 319 (Apr. 14, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 403 (Aug. 6, 2010).

### **Incompetency Determination.**

Once a person's incompetency is established, that incompetency is presumed to continue until a change has been established by proof. In reviewing the probate



court's finding on whether a change has been established, an appellate court affirms unless the court's decision is clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *In re Estate of Lemley*, 9 Ark. App. 140, 653 S.W.2d 141 (1983).

### **Order of Court Binding.**

An order of the probate court upon subject matter and between parties over which it has jurisdiction remains binding upon all parties interested therein until it is set aside under proper procedure. *Sides v. Haynes*, 181 F. Supp. 889 (W.D. Ark. 1960).

### **Order of Final Distribution.**

Appeal from a motion to increase distribution was not an appeal from the final order of distribution, and had nothing to do with the manner of administration; rather, it was an attempt to appeal for the second time an earlier order denying probate of the codicil and denying that the church disclaimed its interest, and was barred by subsection (d) of this section and the doctrine of *res judicata*. *Simmons v. Estate of Wilkinson*, 318 Ark. 371, 885 S.W.2d 673 (1994).

### **Removal of Executor.**

Under this section, any order of a probate court is generally appealable, but under § 28-48-103(f), there can be no appeal from an order appointing or refusing to appoint a special administrator; however, the denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

### **Scope of Review.**

When an appeal is taken from the order of final distribution, all prior appealable judgments and orders to which the appellant has filed an objection within sixty days after the order of judgment was rendered, with certain exceptions, may be reviewed on appeal. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

### **Special Administrator.**

Where heirs at law attacked probate of will and filed petitions asking for removal of executor on the ground that he failed to include certain assets in the inventory and, while matters were pending, the pro-

bate court granted a petition for appointment of a special administrator for purpose of filing proceedings against executors and others, the appointment of a special administrator was proper since probate court had original and exclusive jurisdiction to appoint a special administrator. *Breshears v. Williams*, 223 Ark. 368, 265 S.W.2d 956 (1954).

No appeal is allowed from an order refusing to appoint a special administrator. *In re Estate of McLaughlin*, 306 Ark. 515, 815 S.W.2d 937 (1991).

There can be no appeal from an order refusing to appoint a special administrator. *Harwood v. Monroe*, 65 Ark. App. 57, 984 S.W.2d 93 (1999).

### **Stay.**

Pursuant to subsection (e), court's failure to make a finding of lack of prejudice and issue an order permitting additional proceedings prohibited the court from proceeding further where action was stayed by appeal. *National Union Fire Ins. Co. v. Standridge*, 299 Ark. 91, 771 S.W.2d 22 (1989).

By declining to determine the appellants' heirship claims, the probate court did not impliedly stay any appeal of its order until final distribution; the court's order gave no indication of any intent to curtail the appellants' right to appeal, but only to clarify and restrict the scope of the order and, additionally, the order appealed from was largely concerned with the appointment of a personal representative and thus was not encompassed by subsection (c) of this section. *Snowden v. Riggins*, 70 Ark. App. 1, 13 S.W.3d 598 (2000).

### **Time for Appeal.**

Appeal could not be taken four months after collateral heirs were notified of hearing on final accounting and final accounting was approved and published. *Wilson v. Davis*, 239 Ark. 305, 389 S.W.2d 442 (1965).

In accordance with Ark. R. Civ. P. 81, it is precisely because the probate code and the Arkansas Rules of Civil Procedure set forth different time limits on the court's authority to modify or vacate prior orders that § 28-1-115 applies in probate proceedings; thus, an appeal under this section was timely since Ark. R. Civ. P. 52 was not implicated in an appeal from a



denial of reconsideration arising from a denial of intervention in a probate case. *Helena Reg'l Med. Ctr. v. Wilson*, 362 Ark. 117, 207 S.W.3d 541 (2005).

Appeals from a circuit court's order construing a decedent's will in the widow's favor were timely, under subsections (a) and (g) of this section, because (1) any attempt to appeal from the partial summary judgment would have been a nullity because the partial summary judgment lacked finality because it was obviously partial and other issues remained, and the partial summary judgment did not contain an Ark. R. Civ. P. 54(b) certification allowing for an immediate appeal; (2) the partial summary judgment became final on July 31, 2006, when judgment was entered disposing of the remaining claims; (3) motions for new trial were filed and, under Ark. R. App. P. Civ. 4(b), such motions extended the time for all parties to file their notice of appeal; and (4) the older children filed their notice of appeal on September 18, 2006. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

### Untimely Appeal.

Where an order of the probate court on May 18, 1978, assigned dower and homestead rights to the widow and directed that certain other payments be made to her, the order was final as to dower and homestead rights and was an appealable order, so that, whether the 30-day (§ 16-67-310 [superseded]) or 60-day (§ 28-1-116) time limit for appeals was applicable, the executor's appeal was not timely when he appealed from an order of May 15, 1979, wherein the court directed compliance with its former order of May 18, 1978. *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980).

Appealability of court order held not preserved. *Morris v. Garmon*, 291 Ark. 67, 722 S.W.2d 571 (1987), cert. denied, 484 U.S. 816, 108 S. Ct. 69 (1987).

Court lacked jurisdiction to address the claimant's argument that the circuit court erred in approving the settlement, where the claimant neither filed an objection pursuant to subsection (d) of this section to preserve the issue as part of the appeal from the order of final distribution, nor

did he file a timely notice of appeal to appeal the order separately. *Smith v. Estate of Howell*, 372 Ark. 186, 272 S.W.3d 106 (2008).

Former attorney's appeal from a probate court's order striking the former attorney's response to a motion for modification and declaratory judgment and discovery requests was dismissed with prejudice because (1) the order striking the response was the only issue raised on appeal, (2) the order striking the response was an appealable order, under Ark. R. App. P. Civ. 2(a)(4), (3) the order striking the response was not reviewable under subsection (d) of this section as being an appealable order entered prior to a final order of distribution, as no final order of distribution meeting the requirements of § 28-53-104 was entered, (4) even if the contested order were viewed as an order of a probate court, rather than an order striking a response, the appeal was still untimely, as the order was appealable at the interlocutory stage, under Ark. R. App. P. Civ. 2(a)(12) and this section, and (5) the appeal was not timely filed under Ark. R. App. P. Civ. 4(a). *Brown v. Wilson* (In re Estate of Stinnett), 2011 Ark. 278, — S.W.3d — (2011).

### Written Objection.

Contestant's failure to file written objections to orders concerning unpaid rent and executor and attorney fees precluded appellate review. *Swaffar v. Swaffar*, 327 Ark. 235, 938 S.W.2d 552 (1997), cert. denied, 522 U.S. 820, 118 S. Ct. 73 (1997).

**Cited:** *Black v. Morton*, 233 Ark. 197, 343 S.W.2d 437 (1961); *Brooks v. Baker*, 242 Ark. 128, 412 S.W.2d 271 (1967); *Knight v. Deavers*, 259 Ark. 45, 531 S.W.2d 252, 78 A.L.R.3d 761 (1976); *Hanna v. Hanna*, 273 Ark. 399, 619 S.W.2d 655 (1981); *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982); *Widmer v. Widmer*, 293 Ark. 296, 737 S.W.2d 457 (1987); *Arkansas Dep't of Human Servs. v. Lopez*, 302 Ark. 154, 787 S.W.2d 686 (1990); *White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997); *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998); *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003); *Ferguson v. Ferguson*, 2009 Ark. App. 549, 334 S.W.3d 425 (2009).

**28-1-117. Use of certified mail permitted.**

Anything permitted or required by the Probate Code to be served or transmitted by registered mail may be served or transmitted either by registered mail or by certified mail, and return receipts for the delivery of certified mail shall be received in the courts as prima facie evidence of the delivery to the same extent as return receipts for the delivery of registered mail.

**History.** Acts 1957, No. 29, § 1; A.S.A. 1947, § 62-2017.

referred to in this section, is codified as set out in the note following § 28-1-101.

**Publisher's Notes.** The Probate Code,

**28-1-118. Deceased viable fetus.**

(a) For purposes of the Probate Code, a “deceased viable fetus” is considered a person and decedent so that the probate division of circuit court may have jurisdiction for the administration, settlement, and distribution of the deceased fetus’s estate.

(b) No person shall be liable under subsection (a) of this section when the death of the fetus results from a legal abortion or from the fault of the pregnant woman carrying the fetus.

**History.** Acts 2001, No. 1775, § 1.

referred to in this section, is codified as set out in the note following § 28-1-101.

**Publisher's Notes.** The Probate Code,

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General As-

sembly, Probate Law, 24 U. Ark. Little Rock L. Rev. 631.

**CASE NOTES****Person.**

District court concluded that the Arkansas Supreme Court would extend its decision in *Aka*, which held that wrongful death suits could be brought on behalf of unborn, viable fetuses, to allow a negligence suit to be filed on a child’s behalf, seeking to recover for alleged negligently-inflicted injuries that the child sustained in utero, before she was born. The district court noted that the state supreme court had found persuasive the state legisla-

ture’s decision to expand the definition of “person” in the homicide and probate laws, § 5-1-102(13)(B)(i)(b) and subsection (a) of this section, to include viable fetuses, thereby giving statutory protection to unborn children, and that it would be absurd to think that less protection would be provided under Arkansas law to children who suffered in utero injury, but nevertheless managed to be born. *Crussell v. Electrolux Home Prods.*, 499 F. Supp. 2d 1137 (W.D Ark. 2007).

**28-1-119. Access to decedent’s autopsy records.**

(a) As used in this section, “healthcare provider” means a person, corporation, facility, or institution licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.

(b) A healthcare provider who, in good faith, releases copies of a decedent’s autopsy records upon the authorization of any of the indi-



viduals listed under § 28-1-102(19)(B) shall not be held liable under any criminal law or held civilly liable to the deceased patient’s estate or to any other person.

**History.** Acts 2011, No. 722, § 2.

CHAPTER 2  
DISCLAIMER OF PROPERTY

SUBCHAPTER.

- 1. UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT. [REPEALED.]
- 2. UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999).

**Publisher’s Notes.** For Comments regarding the Uniform Disclaimer of Property Interests Act, see Commentaries Volume B.

**Cross References.** Disclaimer by custodian of minor, § 9-26-218.  
**Effective Dates.** Acts 2003, No. 610, § 19: Sept. 1, 2003.

RESEARCH REFERENCES

**ALR.** Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive life beneficiary. 7 A.L.R.4th 1084.  
Creditor’s right to prevent debtor’s renunciation of benefit under will or debtor’s election to take under will. 39 A.L.R.4th 633.

**Am. Jur.** 23 Am. Jur. 2d, Desc. & D., § 157 et seq.  
**Ark. L. Notes.** Looney, Use of the Disclaimer as an Estate Planning Device under Arkansas Law, 1985 Ark. L. Notes 67.  
**C.J.S.** 26B C.J.S., Desc. & D., § 69.  
**U. Ark. Little Rock L.J.** Legislative Survey, Decedents’ Estates, 4 U. Ark. Little Rock L.J. 591.

SUBCHAPTER 1 — UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT  
[REPEALED.]

SECTION.

28-2-101 — 28-2-109. [Repealed.]

**A.C.R.C. Notes.** As originally codified, chapter 2 was not divided into subchapters. However, subsequent to the enactment of Acts 2003, No. 610, the Arkansas Code Revision Commission determined that, for codification purposes, it would be

necessary to reorganize chapter 2. Accordingly, Acts 2003, No. 610, §§ 1-19, were codified as new subchapter 2. Newly designated subchapter 1 was listed as a repealed subchapter.



**28-2-101 — 28-2-109. [Repealed.]**

**Publisher's Notes.** Former chapter 2, designated herein as subchapter 1, the former Uniform Disclaimer of Property Interests Act, was repealed by Acts 2003, No. 610, § 20. The chapter was derived from the following sources:

28-2-101. Acts 1981, No. 348, §§ 1, 6, 9; A.S.A. 1947, §§ 62-3201, 62-3206.

28-2-102. Acts 1981, No. 348, § 5; A.S.A. 1947, § 62-3205.

28-2-103. Acts 1981, No. 348, § 7; A.S.A. 1947, § 62-3207.

28-2-104. Acts 1981, No. 348, § 2; A.S.A. 1947, § 62-3202.

28-2-105. Acts 1981, No. 348, § 8; A.S.A. 1947, § 62-3208.

28-2-106. Acts 1981, No. 348, § 3; A.S.A. 1947, § 62-3203.

28-2-107. Acts 1981, No. 348, § 2; A.S.A. 1947, § 62-3202.

28-2-108. Acts 1981, No. 348, §§ 2, 4; A.S.A. 1947, §§ 62-3202, 62-3204.

28-2-109. Acts 1981, No. 348, § 2; A.S.A. 1947, § 62-3202.

**SUBCHAPTER 2 — UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (1999)**

SECTION.

28-2-201. Short title.

28-2-202. Definitions.

28-2-203. Scope.

28-2-204. Subchapter supplemented by other law.

28-2-205. Power to disclaim — General requirements, when irrevocable.

28-2-206. Disclaimer of interest in property.

28-2-207. Disclaimer of rights of survivorship in jointly held property.

28-2-208. Disclaimer of interest by trustee.

28-2-209. Disclaimer of power of appointment or other power not held in fiduciary capacity.

28-2-210. Disclaimer by appointee, object, or taker in default of

SECTION.

exercise of power of appointment.

28-2-211. Disclaimer of power held in fiduciary capacity.

28-2-212. Delivery or filing.

28-2-213. When disclaimer barred or limited.

28-2-214. Tax-qualified disclaimer.

28-2-215. Disclaimer of interest in real property — Recording of disclaimer.

28-2-216. Minor, incompetent, or deceased beneficiary.

28-2-217. Relation to Electronic Signatures in Global and National Commerce Act.

28-2-218. Uniformity of application and construction.

28-2-219. [Reserved.]

28-2-220. Effective date.

28-2-221. Repeals.

**28-2-201. Short title.**

This subchapter may be cited as the “Uniform Disclaimer of Property Interests Act (1999).”

**History.** Acts 2003, No. 610, § 1; 2009, No. 346, § 1.

**Amendments.** The 2009 amendment

substituted “Uniform Disclaimer of Property Interests Act (1999)” for “Arkansas Disclaimer of Property Interests Act.”

**28-2-202. Definitions.**

In this subchapter:

(1) “Disclaimant” means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(2) “Disclaimed interest” means the interest that would have passed to the disclaimant had the disclaimer not been made.

(3) “Disclaimer” means the refusal to accept an interest in or power over property.

(4) “Fiduciary” means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person.

(5) “Jointly held property” means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property.

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a State.

(8) “Trust” means:

(A) an express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

**History.** Acts 2003, No. 610, § 2.

### **28-2-203. Scope.**

This subchapter applies to disclaimers of any interest in or power over property, whenever created.

**History.** Acts 2003, No. 610, § 3.

### **28-2-204. Subchapter supplemented by other law.**

(a) Unless displaced by a provision of this subchapter, the principles of law and equity supplement this subchapter.

(b) This subchapter does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this subchapter.

**History.** Acts 2003, No. 610, § 4.

**28-2-205. Power to disclaim — General requirements, when irrevocable.**

(a) A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(b) Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(c) To be effective, a disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in § 28-2-212. In this subsection:

(1) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(2) "Signed" means, with present intent to authenticate or adopt a record, to:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic sound, symbol, or process.

(d) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(e) A disclaimer becomes irrevocable when it is delivered or filed pursuant to § 28-2-212 or when it becomes effective as provided in §§ 28-2-206 — 28-2-211, whichever occurs later.

(f) A disclaimer made under this subchapter is not a transfer, assignment, or release.

**History.** Acts 2003, No. 610, § 5.

**28-2-206. Disclaimer of interest in property.**

(a) In this section:

(1) "Future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(2) "Time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.



(b) Except for a disclaimer governed by § 28-2-207 or § 28-2-208, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in subdivision (b)(2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in subdivisions (b)(3)(C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

**History.** Acts 2003, No. 610, § 6; 2005, No. 1962, § 116; 2009, No. 346, § 2. reversed the sequence of (a)(1) and (a)(2); and rewrote (b)(3).

**Amendments.** The 2009 amendment

## RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

## CASE NOTES

## ANALYSIS

Disclaimer by Heirs.  
Federal Tax Liens.

**Disclaimer by Heirs.**

Where the four children of the intestate who were alive at his death and the five children of the decedent's son who had predeceased him had executed disclaimers of interest in the estate with the purpose of having certain property pass to his widow as the surviving spouse, but the other 12 grandchildren and 10 great grandchildren did not execute disclaimers, the property in question did not pass to the widow because under § 28-9-214 the estate would have passed to the widow only if there were no surviving descen-

dants. The disclaimers in this case resulted in the property in issue passing to the 12 grandchildren and 10 great grandchildren who did not execute disclaimers and not to the widow as the surviving spouse. *Hunt v. United States*, 566 F. Supp. 356 (E.D. Ark. 1983).

**Federal Tax Liens.**

The inheritance property taxpayer held under state law rendered the inheritance "property" or "rights to property" belonging to him within the meaning of 26 U.S.C. 6321 and subject to federal tax liens, despite the taxpayer's exercise of his state-law right to disclaim the interest retroactively. *Drye v. United States*, 528 U.S. 49, 120 S. Ct. 474, 145 L. Ed. 2d 466 (1999).

**28-2-207. Disclaimer of rights of survivorship in jointly held property.**

(a) Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or part, the greater of:

(1) a fractional share of the property determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

(b) A disclaimer under subsection (a) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(c) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

**History.** Acts 2003, No. 610, § 7.

## CASE NOTES

**Creditor's Rights.**

A third party may execute against a spouse's interest in a tenancy by the entirety, subject to the other spouse's contin-

ued rights of possession and survivorship, and interest in one-half of the rents and profits. *Morris v. Solesbee*, 48 Ark. App. 123, 892 S.W.2d 281 (1995).

**28-2-208. Disclaimer of interest by trustee.**

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

**History.** Acts 2003, No. 610, § 8.

**28-2-209. Disclaimer of power of appointment or other power not held in fiduciary capacity.**

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

(3) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

**History.** Acts 2003, No. 610, § 9.

**28-2-210. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.**

(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

**History.** Acts 2003, No. 610, § 10.

**28-2-211. Disclaimer of power held in fiduciary capacity.**

(a) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

**History.** Acts 2003, No. 610, § 11.

**28-2-212. Delivery or filing.**

(a) In this section, “beneficiary designation” means an instrument, other than an instrument creating a trust, naming the beneficiary of:

- (1) an annuity or insurance policy;
- (2) an account with a designation for payment on death;
- (3) a security registered in beneficiary form;



(4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or

(5) any other nonprobate transfer at death.

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(c) In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.

(d) In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.

(e) In the case of an interest in an inter vivos trust:

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

(f) In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, a disclaimer must be delivered to the person making the beneficiary designation.

(g) In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer must be delivered to the person obligated to distribute the interest.

(h) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

(i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate, or to the fiduciary under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

**History.** Acts 2003, No. 610, § 12.

### **28-2-213. When disclaimer barred or limited.**

(a) A disclaimer is barred by a written waiver of the right to disclaim.

(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or

(3) a judicial sale of the interest sought to be disclaimed occurs.

(c) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(d) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(e) A disclaimer is barred or limited if so provided by law other than this subchapter.

(f) A disclaimer of a power over property which is barred by this section is ineffective. A disclaimer of an interest in property which is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this subchapter had the disclaimer not been barred.

**History.** Acts 2003, No. 610, § 13.

### **28-2-214. Tax-qualified disclaimer.**

Notwithstanding any other provision of this subchapter, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this subchapter.

In order for a disclaimer made under the provisions of this subchapter to be effective as a tax-qualified disclaimer pursuant to the provisions of Title 26 of the United States Code, the disclaimer must be made within the time periods set out in Title 26, Section 2518 of the United States Code, generally within 9 months from the day that the interest being disclaimed was created.

**History.** Acts 2003, No. 610, § 14.



**28-2-215. Disclaimer of interest in real property — Recording of disclaimer.**

(a) If real property or an interest therein is disclaimed, a copy of the disclaimer shall be recorded in the office of the circuit clerk of the county in which the property or interest disclaimed is located.

(b) If an interest in or relating to real property is disclaimed and recorded as provided in this section, the spouse of the person entering the disclaimer, if the spouse has consented to the disclaimer in writing, shall be automatically debarred from any dower or curtesy interest in the real estate to which the spouse would have been lawfully entitled except for the disclaimer.

(c) Failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

**History.** Acts 2003, No. 610, § 15.

ests Act differs substantially from Section

**A.C.R.C. Notes.** This section of the Arkansas Disclaimer of Property Inter-

15 of the Uniform Disclaimer of Property Interests Act (U.L.A. 1999).

**28-2-216. Minor, incompetent, or deceased beneficiary.**

A guardian of the property or an executor or administrator of the estate of a minor, incompetent, or deceased beneficiary may, if the fiduciary deems it to be in the best interest of those concerned with the estate of the beneficiary and of those who will take the beneficiary's interest by virtue of the disclaimer and is not detrimental to the best interest of the beneficiary, with or without an order of the court having jurisdiction, shall execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary himself or herself could disclaim if he or she were living, of legal age, or competent.

**History.** Acts 2003, No. 610, § 16.

ests Act differs substantially from Section

**A.C.R.C. Notes.** This section of the Arkansas Disclaimer of Property Inter-

16 of the Uniform Disclaimer of Property Interests Act (U.L.A. 1999).

**28-2-217. Relation to Electronic Signatures in Global and National Commerce Act.**

This subchapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

**History.** Acts 2003, No. 610, § 17.



**28-2-218. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**History.** Acts 2003, No. 610, § 18. 610, codified as §§ 28-2-201 — 28-2-218,  
**Meaning of “this act”.** Acts 2003, No. 28-2-220, and 28-2-221.

**28-2-219. [Reserved.]**

**A.C.R.C. Notes.** Section 19 of the Uniform Disclaimer of Property Interests Act (U.L.A. 1999, as amended), a severability provision, was not adopted in Arkansas.

**28-2-220. Effective date.**

This act takes effect on September 1, 2003.

**History.** Acts 2003, No. 610, § 19. 610, codified as §§ 28-2-201 — 28-2-218,  
**Meaning of “this act”.** Acts 2003, No. 28-2-220, and 28-2-221.

**28-2-221. Repeals.**

Sections 28-2-101 — 28-2-109 are repealed.

**History.** Acts 2003, No. 610, § 20.

**CHAPTERS 3-7**

[Reserved]

***SUBTITLE 2. DESCENT AND DISTRIBUTION*****CHAPTER 8****GENERAL PROVISIONS****SECTION.**

28-8-101. Survivorship abolished.

28-8-102. Declaration of heirs.

**28-8-101. Survivorship abolished.**

All survivorships of real and personal estate are forever abolished.

**History.** Rev. Stat., ch. 82, § 6; C. & M. Dig., § 6232; Pope's Dig., § 4351; A.S.A. 1947, § 61-114.

## RESEARCH REFERENCES

**Ark. L. Rev.** Gift and Estate Tax Consequences of Arkansas Cotenancies, 7 Ark. L. Rev. 237.      Joint Tenancy — Right of Survivorship — “Four Unities,” 23 Ark. L. Rev. 136.

## CASE NOTES

## ANALYSIS

Choses in Action.  
Estate by Entirety.  
Joint Tenancy.

**Choses in Action.**

This section did not abolish survivorship in choses in action. *Sessions v. Peay*, 19 Ark. 267 (1857).

**Estate by Entirety.**

The right of survivorship, where real property is held by the entirety, has not been abolished by this section, nor is the character of such estate changed by a divorce of the parties. *Ward v. Ward*, 186 Ark. 196, 53 S.W.2d 8 (1932).

Personal property acquired with the proceeds of land held by the entirety also constituted an estate by the entirety, and it was, therefore, appropriate for the farm equipment and livestock to pass to the surviving spouse by operation of law. *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991).

**Joint Tenancy.**

Where joint tenancy was created in a loan association certificate, this section did not apply, as joint tenancies are authorized by statute, and survivorship is one of the essentials of a joint tenancy. *Ferrell v. Holland*, 205 Ark. 523, 169 S.W.2d 643 (1943).

**28-8-102. Declaration of heirs.**

(a) In all cases, when any person desires to make a person an heir at law, it shall be lawful to do so by a declaration in writing in favor of the person, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this state.

(b) Before the declaration shall be of any force or effect, it shall be recorded in the county where the declarant may reside, or in the county where the person in whose favor such a declaration is made may reside.

**History.** Acts 1853, §§ 1, 2, p. 207; C. & M. Dig., §§ 3493, 3494; Pope's Dig., §§ 4361, 4362; A.S.A. 1947, §§ 61-301, 61-302.

## RESEARCH REFERENCES

**Ark. L. Rev.** Domestic Relations — Legitimacy and Paternity, 14 Ark. L. Adoption of Adults, 12 Ark. L. Rev. 199.      Rev. 55.

## CASE NOTES

## ANALYSIS

Applicability.  
Acknowledgment in Writing.  
Filing of Document.  
Procurement of Birth Certificate.  
Will Contest.

**Applicability.**

The applicability of this section is not limited to situations where a person desires to make an illegitimate child his heir but applies to anyone that a person may desire to make his heir. *Reed v. Billingslea*, 226 Ark. 589, 291 S.W.2d 497 (1956).

**Acknowledgment in Writing.**

A mere acknowledgment in writing by one person that another person is his illegitimate son or daughter is not sufficient to make the illegitimate person an heir of a father recognizing him as a son or daughter. *Reed v. Billingslea*, 226 Ark. 589, 291 S.W.2d 497 (1956).

**Filing of Document.**

A document which designates a named individual as the declarant's sole heir at law does not have to be filed before the declarant's death for it to be of any effect. *Ricketts v. Ferrell*, 283 Ark. 143, 671 S.W.2d 753 (1984).

**Procurement of Birth Certificate.**

Where father merely procured birth certificate for his illegitimate daughter at her

request and signed it before a notary public but in no way indicated that he wished to make the daughter his heir, this was not sufficient to constitute a declaration in writing that he wished to make the daughter his heir. *Reed v. Billingslea*, 226 Ark. 589, 291 S.W.2d 497 (1956).

**Will Contest.**

Sufficient showing adverse to a will to permit person claiming under this section to join in its contest. *First Nat'l Bank v. Ary*, 180 Ark. 1084, 24 S.W.2d 336 (1930).

**Cited:** *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979).

CHAPTER 9

INTESTATE SUCCESSION

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. ARKANSAS INHERITANCE CODE OF 1969.

RESEARCH REFERENCES

Am. Jur. 23 Am. Jur. 2d, Desc. & D.,  
§ 1 et seq.

C.J.S. 26B C.J.S., Desc. & D., § 1 et  
seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — ARKANSAS INHERITANCE CODE OF 1969

SECTION.

- 28-9-201. Title.
- 28-9-202. Definitions.
- 28-9-203. Intestate succession generally.
- 28-9-204. Per capita distribution.
- 28-9-205. Per stirpes distribution.
- 28-9-206. Interests transmissible by inheritance.
- 28-9-207. Heirs as tenants in common.
- 28-9-208. Male not preferred over female.
- 28-9-209. Legitimacy of child — Effect.
- 28-9-210. Posthumous heirs.

SECTION.

- 28-9-211. Alienage.
- 28-9-212. Computing degrees of consanguinity.
- 28-9-213. Kinsmen of the half blood.
- 28-9-214. Tables of descents.
- 28-9-215. Devolution where no heir under § 28-9-214.
- 28-9-216. Advancements.
- 28-9-217. Debts to decedent.
- 28-9-218. Doctrine of first purchaser abolished.



## SECTION.

28-9-219. Distinction between ancestral estates and new acquisitions abolished.

## SECTION.

28-9-220. Conveyance to heirs or next of kin — Doctrine of worthier title abolished.

**Publisher's Notes.** Acts 1969, No. 303, § 26, provided, in part, that this subchapter would control, for purposes of intestate succession, the devolution of real and personal property of all persons dying totally or partially intestate after midnight, December 31, 1969, and that the laws repealed or superseded by this subchapter would remain in effect with respect to intestacies occurring prior to that date.

**Cross References.** Claims for nursing care, § 28-13-103.

**Effective Dates.** Acts 1969, No. 303, § 26: midnight, Dec. 31, 1969.

Acts 1979, No. 1015, § 5: Apr. 18, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the U.S. Supreme Court in *Trimble v. Gordon*, 430 U.S. 762 (1977) found that a state's statutory prohibition of illegitimate children inheriting by intestate succession from their fathers while allowing legitimate children to inherit by intestate succession from both their fathers and mothers was constitutionally flawed under the Fourteenth Amendment's equal protection clause as discriminating against illegitimates where it excludes unnecessarily those categories of illegitimate children of intestate men for which inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws; that the *Trimble* decision, in effect, held that Arkansas Statute 61-141 (d) [see now § 28-9-209] as presently written is unconstitutional under the equal protection clause as discriminating against illegitimates in that it prohibits absolutely any inheritance from the father; that this Act is designed to bring the Arkansas law relating to the rights of an illegitimate child to inherit from the father into conformity with the decision of the Court in the *Trimble* case and should be given effect immediately. Therefore, an

emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 703, § 8: Mar. 28, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law provides for escheated estates to become the property of the State; that due to the financial hardships facing counties it now appears more equitable to allow estates to escheat to the county wherein the decedent resided at death; that such property will continue to escheat to the State until this Act goes into effect. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 847, § 3: Apr. 8, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that some confusion exists concerning the method of computing degrees of consanguinity under present Arkansas law; that Section 14 of Act 303 of 1969 was designed and intended to apply in computing degree of relationship between two kinsmen who are related laterally and not in a direct line of ascent or descent; that if the language of that section is applied in determining degrees of relationship to persons in a direct line of ascent or descent the result is impractical and unworkable; that the purpose of this Act is to prescribe a specific procedure for determining degrees of relationship between persons related in a direct line of ascent or descent and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**ALR.** Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration. 2 A.L.R.4th 1315.

Homicide as precluding taking under will or by intestacy. 25 A.L.R.4th 787.

Adopted children as subject to protection of statute regarding right of children pretermitted by will, or statute preventing disinheritance of child. 43 A.L.R.4th 947.

Rights of inheritance as between kindred of whole and half blood. 47 A.L.R.4th 561.

**Ark. L. Rev.** The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Notes, Estate of Sargent v. Benton State Bank: Judicial Limitations on a Slayer's Right to Inherit from the Decedent, 38 Ark. L. Rev. 653.

Case Note, Cox v. Whitten: Limiting the Inheritance Rights of Adopted Adults, etc., 40 Ark. L. Rev. 627.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Willis: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

## 28-9-201. Title.

This subchapter may be cited as the "Arkansas Inheritance Code of 1969".

**History.** Acts 1969, No. 303, § 25; A.S.A. 1947, § 61-155.

## 28-9-202. Definitions.

As used in this subchapter:

(1)(A) "Descendants" means a person's children, grandchildren, and all others, however remotely related to such a person, who are in a direct line of descent from him or her. In other words, the term "descendants" refers to lineal descendants and excludes an intestate's ascendants or collateral relatives.

(B) The term "descendants", wherever used in this subchapter, shall also include adopted children and their descendants of the intestate or of any other person in connection with whom the term "descendants" may be used.

(C) In determining which of an intestate's descendants shall constitute an inheriting class, the descendants of a living descendant shall be excluded from the class; and

(2) "Dying intestate" means dying without a valid last will and testament. A person so dying is referred to in this subchapter as an "intestate", and it is recognized that a person may die wholly or partially intestate.

**History.** Acts 1969, No. 303, §§ 2, 3; A.S.A. 1947, §§ 61-132, 61-133.



CASE NOTES

**Disclaimer by Descendants.**

Where the four children of the intestate who were alive at his death and the five children of the decedent's son who predeceased him had executed disclaimers of interest in the estate with the purpose of having certain property pass to his widow as the surviving spouse, but the other 12 grandchildren and 10 great grandchildren did not execute disclaimers, the property in question did not pass to the widow because under § 28-9-214 the estate

would pass to the widow only if there were no surviving descendants. The disclaimers in this case resulted in the property in issue passing to the 12 grandchildren and 10 great grandchildren who did not execute disclaimers and not to the widow as the surviving spouse. *Hunt v. United States*, 566 F. Supp. 356 (E.D. Ark. 1983).

**Cited:** *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979); *Smith v. Wright*, 300 Ark. 416, 779 S.W.2d 177 (1989).

**28-9-203. Intestate succession generally.**

(a) Any part of the estate of a decedent not effectively disposed of by his or her will shall pass to his or her heirs as prescribed in the following sections.

(b) In this connection, the terms "heir" and "heirs", as used in this subchapter, are intended to designate the person or persons who succeed by inheritance to the ownership of real or personal property in respect to which a person dies intestate.

(c)(1) Real estate passes immediately to the heirs upon the death of the intestate, subject to the right of the personal representative under the Probate Code to mortgage, lease, exchange, sell, or possess it for the payment of claims or legacies, the preservation or protection of the assets of the estate, the distribution of the estate, or any other purpose in the best interest of the estate.

(2) However, personalty will pass to the personal representative, if any, for distribution to the heirs unless otherwise disposed of as permitted by the Probate Code.

**History.** Acts 1969, No. 303, § 1; 1973, No. 33, § 1; A.S.A. 1947, § 61-131.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

CASE NOTES

ANALYSIS

Disclaimer by Heirs.  
Pretermitted Children.  
Putative Father.  
Widow.

**Disclaimer by Heirs.**

Where the heirs of the intestate, who were the four children of the intestate who were alive at his death and the five children of a son who predeceased him, had executed disclaimers of interest in the estate with the purpose of having certain

property pass to his widow as the surviving spouse, but the other 12 grandchildren and 10 great grandchildren did not execute disclaimers, the property in question did not pass to the widow because under § 28-9-214 the estate would pass to the widow only if there were no surviving descendants. The disclaimers in this case resulted in the property in issue passing to the 12 grandchildren and 10 great grandchildren who did not execute disclaimers and not to the widow as the surviving spouse. *Hunt v. United States*, 566 F. Supp. 356 (E.D. Ark. 1983).



**Pretermitted Children.**

If an owner of real property dies leaving a will which devises the property to his widow, but does not make mention of his children, the children are considered pretermitted heirs, and decedent is deemed to have died intestate as to them, so that the title to the property vests immediately in his heirs subject to appropriate provisions for administration under the Probate Code and subject to the widow's dower and homestead rights, if any. *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970) (decision under prior law).

**Putative Father.**

Evidence that the child had lived in the home of the putative father for several months and that the putative father had listed the child as a dependent child on his income tax returns for three years, with-

out other acknowledgment of paternity, without testimony of the child's mother, and without marriage of the mother and the putative father was insufficient to establish the child as an heir of the putative father. *Bell v. Bell*, 249 Ark. 959, 462 S.W.2d 837 (1971).

**Widow.**

A widow is not an heir within the meaning of the statute of descent and distribution. *Johnson v. Supreme Lodge*, 53 Ark. 255, 13 S.W. 794 (1890) (decision under prior law).

**Cited:** *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979); *Farris v. Farris*, 287 Ark. 479, 700 S.W.2d 371 (1985); *Sutton v. Milburn*, 289 Ark. 421, 711 S.W.2d 808 (1986); *Hartford Ins. Co. v. Brewer*, 54 Ark. App. 1, 922 S.W.2d 360 (1996).

**28-9-204. Per capita distribution.**

Heirs will take per capita in the following circumstances:

(1)(A) If all members of the class who inherit real or personal property from an intestate are related to the intestate in equal degree, they will inherit the intestate's estate in equal shares and will be said to take per capita.

(B) For illustration:

(i) If the intestate leaves no heirs except children, the children will take per capita and in equal shares;

(ii) If the intestate leaves no heirs except grandchildren, all the grandchildren will take per capita and in equal shares; and

(iii) If the inheriting class consists solely of great-grandchildren, or any more remote descendants of the intestate who are all related to the intestate in the same degree, they will take per capita.

(C) The same rule applies to the inheritance by collateral heirs of the intestate as when, for illustration, the inheriting class consists entirely of brothers and sisters, or consists solely of nieces and nephews who are descendants of deceased brothers and sisters, or consists of any other collateral relatives of the intestate who are related to the intestate in equal degree.

(D) Likewise, when the inheriting class consists of uncles, aunts, and grandparents or great-uncles, great-aunts, and great-grandparents who, under § 28-9-214, may constitute an inheriting class even though they represent different generations, all members of such a class who survive the intestate will take per capita and share equally; and

(2) If the members of the inheriting class are related to the intestate in unequal degree, those in the nearer degree will take per capita or in

their own right, and those in the more remote degree will take per stirpes or through representation as provided in § 28-9-205.

**History.** Acts 1969, No. 303, § 4; A.S.A. 1947, § 61-134.

### CASE NOTES

**Cited:** Lucas v. Handcock, 266 Ark. Union Nat'l Bank, 268 Ark. 292, 595 142, 583 S.W.2d 491 (1979); Dickerson v. S.W.2d 677 (1980).

#### **28-9-205. Per stirpes distribution.**

(a)(1) Heirs will take “per stirpes” if the intestate is predeceased by one (1) or more persons who would have been entitled to inherit from the intestate had such a person survived the intestate.

(2) The intestate’s estate shall be divided into as many equal shares as there are:

(A) Surviving heirs in the nearest degree of kinship to the intestate; and

(B) Persons, hereinafter called “predeceased persons”, in the same degree of kinship as the heirs mentioned in subdivision (a)(2)(A) of this section, who predeceased the intestate leaving descendants who survived the intestate.

(3) Each surviving heir in the nearest degree taking per capita shall receive one (1) share and the descendants of each predeceased person taking per stirpes shall collectively receive one (1) share.

(b)(1) If the descendants of a predeceased person are all related to the predeceased person in the same degree, they will take in equal parts the share accruing to them collectively.

(2) However, if such descendants are related to the predeceased person in unequal degree, the share accruing to them collectively shall pass per capita to those in the nearer degree and per stirpes to those in the more remote degree according to the formula set out in subdivision (a)(3) of this section.

(3) If the descendants of a predeceased person are found in multiple generations, the above formula for division shall be applied in respect to the descendants in each generation.

(c)(1) The provisions of this section shall be applied to both real and personal property and to both lineal and collateral heirs.

(2) However, if under § 28-9-214, the inheriting class consists of grandparents and uncles and aunts, or of great-grandparents and great-uncles and great-aunts, the per stirpes rule shall apply when an uncle or aunt, or great-uncle or great-aunt, as the case may be, shall predecease the intestate, leaving descendants. However, it shall not be applied in respect to a grandparent or great-grandparent of the intestate who predeceased the intestate. In this event the grandparent or great-grandparent shall not be counted in determining the number of shares passing to the members of the inheriting class or those taking through them by representation.



**History.** Acts 1969, No. 303, § 5; A.S.A. 1947, § 61-135.

### CASE NOTES

#### ANALYSIS

Life Insurance.  
Nephews and Nieces.  
Per Capita Distribution Proper.

#### Life Insurance.

Where a benefit certificate of a life insurance company is payable at a mother's death to her children, the issue of a child who died before the mother succeeds to the parent's share. *Johnson v. Hall*, 55 Ark. 210, 17 S.W. 874 (1891) (decision under prior law).

#### Nephews and Nieces.

After setting aside the widow's share, there being no nearer kindred than nephews and nieces, an intestate's ancestral estate shall be divided into as many shares as there are living nephews and nieces or, being deceased, then having

descendants alive. The nephews and nieces take per capita while descendants of those deceased take per stirpes. *Daniels v. Johnson*, 216 Ark. 374, 226 S.W.2d 571, 15 A.L.R.2d 1401 (1950) (decision under prior law).

#### Per Capita Distribution Proper.

In a probate dispute regarding the estate of the decedent, because the decedent's aunts, uncles, and grandparents had predeceased her, the per capita distribution of the estate at the first-cousin level under subdivision (a)(2) of this section was proper as it was the first level at which the intestate had surviving heirs, regardless of what level was used to determine the inheriting class under § 28-9-214. *Stokan v. Estate of Cann*, 100 Ark. App. 216, 266 S.W.3d 210 (2007).

**Cited:** *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980).

### 28-9-206. Interests transmissible by inheritance.

(a) Heirs may inherit every right, title, and interest not terminated by the intestate's death in real or personal property owned by an intestate at the time of the intestate's death and not disposed of by will.

(b) The rights of heirs will be subject to:

(1) The dower or curtesy of the intestate's surviving spouse;  
(2) The homestead rights of the surviving spouse and children of the intestate, including the quarantine rights of the surviving spouse;

(3) All statutory rights and allowances to the surviving spouse and minor children;

(4) Any rights of a surviving spouse in respect to income tax refunds made pursuant to a joint federal income tax return; and

(5) An administration of the estate, if any.

(c) The portion of the intestate's estate which may pass by inheritance, after giving effect to subsection (b) of this section and to any partial testamentary disposition, is hereinafter sometimes called the "heritable estate" of the intestate.

(d) In this connection it is declared that subject to the conditions set out above, the intestate's entire right and title in respect to any and all reversionary and remainder interests, rights of reentry or forfeiture for condition broken, executory interests, and possibilities of reverter, whether any of such interests are vested or contingent, shall be transmissible by inheritance and will pass to the intestate's heirs determined as of the time of the intestate's death.



(e) An intestate may transmit his or her title to real or personal property by inheritance even though:

(1) The intestate is not in actual or constructive possession thereof; and

(2) There may be adverse possession thereof.

**History.** Acts 1969, No. 303, §§ 7, 8;  
A.S.A. 1947, §§ 61-137, 61-138.

## CASE NOTES

### ANALYSIS

Dower.

Incomplete Devise.

Inheritable Interests.

Life Estate.

Murder of Decedent.

Personal Estate.

Real Estate.

Rights of Widow and Children.

Tenants in Common.

Title.

War Risk Insurance.

### Dower.

Where a husband died seized of estate in land for life of another, his widow was entitled to receive as dower one-third thereof, absolutely, as in case of personalty. *Stull v. Graham*, 60 Ark. 461, 31 S.W. 46 (1895) (decision under prior law).

### Incomplete Devise.

Under a devise of a life estate to the only child of the devisor, with no designation of a remainderman, the child takes the fee under the statute of descent. *Wyatt v. Henry*, 121 Ark. 479, 181 S.W. 297 (1915) (decision under prior law).

### Inheritable Interests.

A personal right to use land is not inheritable. *Field v. Morris*, 88 Ark. 148, 114 S.W. 206 (1908) (decision under prior law).

The interest of a purchaser under a bond for title is inheritable. *Hill v. Heard*, 104 Ark. 23, 148 S.W. 254 (1912) (decision under prior law).

### Life Estate.

A conveyance of land by a grantor to a named son "and unto his bodily, or his brothers and sisters heirs and assigns forever" amounted in substance to a conveyance to the son for life, with a remainder to (a) the son's bodily heirs, or, if the

son should leave no bodily heirs, then to (b) the heirs of his brothers and sisters; such conveyance was not brought within the rule in *Shelley's case* by means of clause (b). *Robertson v. Sloan*, 222 Ark. 671, 262 S.W.2d 148 (1953) (decision under prior law).

### Murder of Decedent.

Title to all lands of a father and mother who were murdered by their son vested in their only other heir, another son, and the issue of the son who had been convicted of the murders was not entitled to any interest in the lands of his deceased grandparents. *Wright v. Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970) (decision under prior law).

### Personal Estate.

Personalty converted into realty by surviving partner descends as realty. *Coolidge v. Burke*, 69 Ark. 237, 62 S.W. 583 (1901) (decision under prior law).

The owner of personal property may dispose of it at will during his life. *Wooton v. Keaton*, 168 Ark. 981, 272 S.W. 869 (1925) (decision under prior law).

### Real Estate.

Immediately upon an intestate's death, the title to real estate descends to the heirs at law. *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950) (decision under prior law).

### Rights of Widow and Children.

Where a widow, pursuant to a family agreement, conveys her homestead and dower interests in certain lands of her husband to one of his heirs, she will be held to have abandoned her rights therein. *Felton v. Brown*, 102 Ark. 658, 145 S.W. 552 (1912) (decision under prior law).

Where an only child dies before the husband, the surviving wife does not, as

the child's heir, inherit the whole of the husband's land on his death, as there is no title to pass through the child. *Smith v. Goldby*, 172 Ark. 549, 289 S.W. 780 (1927) (decision under prior law).

Where property had been devised to the widow of the decedent under a will which made no mention of his children, the children became pretermitted heirs in the land of the deceased parent, and a judgment creditor of one of the surviving children and heir-at-law could levy execution on the interest of such heir in the land in question. *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970) (decision under prior law).

#### **Tenants in Common.**

Lands held by tenants in common by descent are distributed in equal shares. *Cottonwood Lumber Co. v. Walker*, 106 Ark. 102, 152 S.W. 1005 (1912) (decision under prior law).

#### **Title.**

As a general rule, the legal, as distinguished from equitable, title determines

the course of descent. *Howard v. Grant*, 107 Ark. 594, 156 S.W. 433 (1913) (decision under prior law).

#### **War Risk Insurance.**

All war risk instalments of insurance become assets of the estate of the insured to be distributed to his heirs in accordance with the intestacy laws as of the date of his death, and upon the subsequent death of one of the beneficiaries, his share goes to his heirs. *Jones v. Jones*, 186 Ark. 359, 53 S.W.2d 586 (1932) (decision under prior law).

Where beneficiary under war risk policy was intestate veteran's only heir as of date of his death, balance due on beneficiary's death was payable as provided in his will and not to veteran's heirs as of date of beneficiary's death. *Wade v. Wade*, 192 Ark. 7, 90 S.W.2d 214 (1936), cert. denied, 299 U.S. 548, 57 S. Ct. 11, 81 L. Ed. 404 (1936) (decision under prior law).

**Cited:** *Fletcher v. Hurdle*, 259 Ark. 640, 536 S.W.2d 109 (1976).

### **28-9-207. Heirs as tenants in common.**

When real or personal property is transmitted by inheritance to two (2) or more persons, they will take the same as tenants in common. However, when personal property is distributed in separate units by a personal representative, each distributee will hold his or her distributed part in severalty.

**History.** Acts 1969, No. 303, § 9; A.S.A. 1947, § 61-139.

### **28-9-208. Male not preferred over female.**

The common law principle that in the matter of inheritance the male will be preferred over the female shall constitute no part of the Arkansas law of inheritance.

**History.** Acts 1969, No. 303, § 10; A.S.A. 1947, § 61-140.

### **28-9-209. Legitimacy of child — Effect.**

(a)(1) If the parents of a child have lived together as man and wife and, before the birth of their child, have participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed, though the attempted marriage is void, their child is deemed to be the legitimate child of both parents for all purposes of intestate succession.



(2) A child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes.

(b) If a man has a child or children by a woman, and afterward intermarries with her and recognizes the child or children to be his, the child or children shall be deemed and considered legitimate.

(c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

(d) An illegitimate child or his or her descendants may inherit real or personal property in the same manner as a legitimate child from the child's mother or her blood kindred. The child may inherit real or personal property from his or her father or from his or her father's blood kindred, provided that at least one (1) of the following conditions is satisfied and an action is commenced or claim asserted against the estate of the father in a court of competent jurisdiction within one hundred eighty (180) days of the death of the father:

(1) A court of competent jurisdiction has established the paternity of the child or has determined the legitimacy of the child pursuant to subsection (a), (b), or (c) of this section;

(2) The man has made a written acknowledgment that he is the father of the child;

(3) The man's name appears with his written consent on the birth certificate as the father of the child;

(4) The mother and father intermarry prior to the birth of the child;

(5) The mother and putative father attempted to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

(6) The putative father is obligated to support the child under a written voluntary promise or by court order.

(e) Property of an illegitimate person passes in accordance with the usual rules of intestate succession to his or her mother and his or her kindred of her blood and to his or her father and his or her kindred of his or her father's blood, provided that paternity has been established in accordance with subsection (d) of this section.

(f) Nothing contained in this section shall extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise.

**History.** Acts 1969, No. 303, § 11;  
1979, No. 1015, §§ 1-3; A.S.A. 1947,  
§§ 61-141, 61-141.1.



## RESEARCH REFERENCES

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## CASE NOTES

## ANALYSIS

Constitutionality.

Applicability.

Annulment of Marriage.

Bigamous Marriage.

Inheritance by Illegitimate.

Presumption of Legitimacy.

Proof of Paternity.

Retroactive Effect.

**Constitutionality.**

This section does not unconstitutionally discriminate against blacks. *Brown v. Danley*, 263 Ark. 480, 566 S.W.2d 385 (1978), cert. denied, 439 U.S. 983, 99 S. Ct. 572, 58 L. Ed. 2d 654 (1978).

Former provision of subsection (d) limiting the right of an illegitimate child to inherit from its father bore no rational relationship to any legitimate state purpose. *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979) (decision under prior law).

This section does not violate the equal protection clause of U.S. Const. Amend. 14. Statutory differentiation based solely on illegitimacy can be justified by a state's interests in preventing spurious claims against intestate estates, and in the maintenance of a prompt and accurate method of distributing an intestate's property. *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

**Applicability.**

Former statute was not applicable where question involved was whether child born after divorce was issue of the marriage. *George v. George*, 247 Ark. 17, 444 S.W.2d 62 (1969) (decision under prior law).

This section and § 28-40-103 are not applicable in a paternity case; paternity

action must be commenced in chancery court because it is not a determination of heirship. In re Estate of F.C., 321 Ark. 191, 900 S.W.2d 200 (1995).

This section is irrelevant in the context of the distribution of the proceeds of a wrongful-death settlement. *Rager v. Turley*, 68 Ark. App. 187, 6 S.W.3d 113 (1999).

Subsection (d) does not apply to claims to share in a wrongful-death settlement. *Rager v. Turley*, 342 Ark. 223, 27 S.W.3d 729 (2000).

Where the alleged heir had never been determined a legitimate heir of the decedent, his petition for appointment as administrator of the estate could not constitute an action or claim against the estate under subsection (d) of this section because the alleged heir did not comply with the 180-day requirement. *Burns v. Estate of Cole*, 364 Ark. 280, 219 S.W.3d 134 (2005).

**Annulment of Marriage.**

Annulment decree against mother on the ground that she was pregnant by other man, which was offered into evidence to determine heirship of son to intestate's estate, was not res judicata as to question of legitimacy of son. *Earp v. Earp*, 250 Ark. 107, 464 S.W.2d 70 (1971) (decision under prior law).

**Bigamous Marriage.**

Children of bigamous marriage were legitimate and entitled to inherit from their father. *Evatt v. Miller*, 114 Ark. 84, 169 S.W. 817 (1914); *Cooper v. McCoy*, 116 Ark. 501, 173 S.W. 412 (1915); *Morrison v. Nicks*, 211 Ark. 261, 200 S.W.2d 100 (1947) (decision under prior law).

Marriage between plaintiff and defendant while defendant was legally married

to another was void, but divorce proceeding would be remanded for the purpose of entering order legitimatizing children born of union. *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953) (decision under prior law).

The fact that a mother may not have been divorced from former husband would not be material insofar as the legitimacy of a child is concerned. *Yocum v. Holmes*, 222 Ark. 251, 258 S.W.2d 535 (1953) (decision under prior law).

### **Inheritance by Illegitimate.**

Where a serviceman's life insurance policy named no beneficiary but stated that proceeds were to go first to a widow, second to a child, and third to his parents, the proceeds would go to his illegitimate child whose paternity he had acknowledged by affidavit filed in court. *Cantrell v. Prudential Ins. Co. of Am.*, 252 Ark. 70, 477 S.W.2d 484 (1972).

This section giving an illegitimate child 180 days to file a claim creates a new right, and the right is created for only 180 days. State interests may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

Because there is no comma separating "illegitimate child" and the modifier "except such as would inherit under the law of descent and distribution" in the definition of child in § 28-1-102(a)(1), the General Assembly intended for "except such as would inherit..." to modify only "illegitimate children." *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

The heirs of the decedent were not estopped from invoking the requirement of subsection (d) of this section that the illegitimate son of the decedent commence an action against the decedent's estate within 180 days of the decedent's death, notwithstanding that the illegitimate son had been acknowledged by the decedent, that he was named as the decedent's son in his obituary, and that he was described as an heir in a deed. *Raspberry v. Ivory*, 67 Ark. App. 227, 998 S.W.2d 431 (1999).

Illegitimate child was awarded a share of his father's estate as a pretermitted

heir under § 28-39-407(b) where the wife waived an issue regarding competent jurisdiction by failing to object to a failure to join the estate in a paternity action; moreover, collateral estoppel applied because the wife appeared at the paternity proceeding, it was fully litigated, the necessary party issue was not raised, and no appeal was filed. *Taylor v. Hamilton*, 90 Ark. App. 235, 205 S.W.3d 149 (2005).

Time limitations in the nonclaim statute, § 28-50-101(a), do not apply to claims by illegitimate children under subsection (d) of this section; therefore, the trial court did not err by finding that an illegitimate son was a pretermitted heir. *Taylor v. Hamilton*, 90 Ark. App. 235, 205 S.W.3d 149 (2005).

Circuit court did not err in finding that one of the six conditions set out in subdivisions (d)(1)-(6) was required to be satisfied within 180 days from the death of the decedent; the alleged heir failed to commence an action or assert a claim pursuant to the statute. *Burns v. Estate of Cole*, 364 Ark. 280, 219 S.W.3d 134 (2005).

Decedent's illegitimate, pretermitted child was not entitled to inherit from decedent as he was required to meet requirements of §§ 28-39-407(b), 28-1-102(a)(1), and the six requirements of subsection (d) of this section, but he failed to show that he had been recognized by the decedent or by a court and he failed to file his action within 180 days of decedent's death. *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

### **Presumption of Legitimacy.**

A parent's testimony is incompetent when it is employed to bastardize a child, which is presumed legitimate by one of the strongest presumptions found in the law. *Bankston v. Prime W. Corp.*, 271 Ark. 727, 610 S.W.2d 586 (1981).

There is a statutory presumption that a child born during a marriage is the legitimate child of both spouses. The longstanding common law rule is that the declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage. *Lahey v. Lahey*, 18 Ark. App. 182, 712 S.W.2d 663 (1986).

Presumption of legitimacy of a child conceived, but not born, during marriage, is rebuttable. *Willmon v. Hunter*, 297 Ark. 358, 761 S.W.2d 924 (1988).

A child is considered legitimate if the parents were married at the time of its



conception and before its birth, even though they were not married to each other at the time the child was born. *Willmon v. Hunter*, 297 Ark. 358, 761 S.W.2d 924 (1988).

It is not against the public policy of this state to allow a third party to attempt to illegitimize a child which was conceived, but not born, during marriage. *Willmon v. Hunter*, 297 Ark. 358, 761 S.W.2d 924 (1988).

### **Proof of Paternity.**

Evidence established recognition of child by father. *Rogers v. Morgan*, 213 Ark. 229, 210 S.W.2d 129 (1948); *Parker v. Hadley*, 227 Ark. 161, 296 S.W.2d 391 (1956); *Tuttle v. Phillips*, 249 Ark. 617, 460 S.W.2d 328 (1970) (decision under prior law).

Evidence insufficient to establish paternity. *Martin v. Martin*, 212 Ark. 204, 205 S.W.2d 189 (1947); *Edgar v. Dickens*, 230 Ark. 7, 320 S.W.2d 761 (1959); *Johnson v. Sanford*, 239 Ark. 362, 389 S.W.2d 421 (1965) (decision under prior law); *Eldridge v. Sullivan*, 980 F.2d 499 (8th Cir. 1992).

In a suit to determine the distribution of proceeds of an insurance policy, it was not error to introduce an affidavit made by the deceased in a bastardy suit after being advised by an attorney, acknowledging that he was the father of the illegitimate child. *Cantrell v. Prudential Ins. Co. of Am.*, 252 Ark. 70, 477 S.W.2d 484 (1972).

Where the proof as a whole indicated that the decedent, upon a number of occasions, had acknowledged the petitioner as being his son, the trial court's finding to the contrary was reversible error. *Christman v. Jones*, 254 Ark. 936, 497 S.W.2d 14 (1973).

Where in an action partitioning a decedent's estate, some putative heirs of the decedent sought a share of the proceeds when the land was partitioned, the evidence presented did not support their claim through their mother who allegedly was a daughter of the decedent, since the putative heirs did not prove that the decedent even knew their mother's mother some 26 years before he married her or that he fathered her child, the putative heirs' mother, when he was 15 and she was only 13 years of age. *Ford v. King*, 268 Ark. 128, 594 S.W.2d 227 (1980).

In probate proceeding which occurred after subsection (d) of this section was

declared unconstitutional, but prior to 1979 amendment of the subsection, determination that woman was illegitimate daughter of decedent was properly made from clear, cogent, and convincing proof rather than written acknowledgment of the putative father or a judicial determination during the lifetime of the parties. *Lewis v. Petty*, 272 Ark. 250, 613 S.W.2d 585 (1981).

Testimony as to general reputation in the community on the issue of paternity and woman's birth certificate were admissible in order to determine if the woman was the illegitimate daughter of decedent. *Lewis v. Petty*, 272 Ark. 250, 613 S.W.2d 585 (1981) (decision under prior law).

Evidence supported the finding that the claimants were the legitimate children of their father and were entitled to inherit from their great-uncle through their father. *Allen v. Wallis*, 279 Ark. 149, 650 S.W.2d 225 (1983).

Paternity must be proven by clear and convincing evidence, i.e., that which instantly tilts the scales in the affirmative when weighed against evidence in opposition, and clearly convinces the factfinder that the evidence is true. *Eldridge v. Sullivan*, 980 F.2d 499 (8th Cir. 1992).

### **Retroactive Effect.**

There is no language from which a legislative intention that the 1979 amendment to this section should have retroactive effect can be implied. *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979).

To prevent chaotic conditions arising from the lack of title to real property, *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), under which former subsection (d) of this section was constitutionally invalid should not be applied retroactively. *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979), cert. denied, 444 U.S. 942, 100 S. Ct. 297, 62 L. Ed. 2d 309 (1979).

**Cited:** *Walker v. Yarbrough*, 257 Ark. 300, 516 S.W.2d 390 (1974); *Compton v. White*, 266 Ark. 648, 587 S.W.2d 829 (1979); *Stewart v. Smith*, 269 Ark. 363, 601 S.W.2d 837 (Ark. 1980); *Fulton v. Harris*, 658 F.2d 641 (8th Cir. 1981); *Henry v. Johnson*, 292 Ark. 446, 730 S.W.2d 495 (1987); *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008); *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008).



**28-9-210. Posthumous heirs.**

(a) Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.

(b) However, no right of inheritance shall accrue to any person other than a lineal descendant of the intestate, unless such a person has been born at the time of the intestate's death.

**History.** Acts 1969, No. 303, § 12;  
A.S.A. 1947, § 61-142.

**RESEARCH REFERENCES**

**ALR.** Legal status of posthumously conceived child of decedent. 17 A.L.R.6th 593.

**CASE NOTES****In Vitro Fertilization.**

Child who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after his father's death, could not inherit from the father under

Arkansas intestacy law as a surviving child under this section; in order to inherit, the child had to have been conceived before the father's death. *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008).

**28-9-211. Alienage.**

(a) No person is disqualified to inherit, or transmit by inheritance, real or personal property because he or she is or has been an alien.

(b) An alien may inherit, or transmit by inheritance, as freely as a citizen of this state, subject to the same laws of intestate succession which are applicable to citizens of this state.

(c) The term "alien" as used in this section refers to a person who is not a citizen of the United States.

**History.** Acts 1969, No. 303, § 13;  
A.S.A. 1947, § 61-143.

**28-9-212. Computing degrees of consanguinity.**

(a)(1) In computing the degrees of relationship between any two (2) kinsmen who are not related in a direct line of ascent or descent, it is proper to start with the common ancestor of the kinsmen and count downwards. In whatever degree the kinsmen or the more remote of them is distant from the common ancestor, that is the degree in which they are related to each other.

(2) Thus two (2) or more children of a common parent are related to each other in the first degree, because from the common parent to each of the children is counted only one (1) degree.

(3) But a person and his or her nephew are related in the second degree, for the nephew is two (2) degrees removed from his grandparent who is the common ancestor.

(4) A person and his or her second cousin are related in the third degree, for they are both three (3) degrees removed from the great-grandparent who is their common ancestor.

(b) In computing the degrees of relationship between any two (2) kinsmen related in a direct line of ascent or descent, the degree of relationship shall be determined by starting with one (1) of the persons and counting up or down to the other. Thus, a person and his or her:

- (1) Parent or child are related in the first degree;
- (2) Grandparent or grandchild are related in the second degree; and
- (3) Great-grandparent or great-grandchild are related in the third degree.

**History.** Acts 1969, No. 303, § 14; A.S.A. 1947, § 61-144; Acts 1987, No. 847, § 1.

CASE NOTES

ANALYSIS

Advancement of Class.  
Common Ancestor.  
Second Degree.

**Advancement of Class.**

When the persons composing the nearest class of kin of an intestate die before his death, the next class in order will be advanced, and the persons composing it will inherit equally if equal in degree, and per stirpes if not in equal degree. Garrett v. Bean, 51 Ark. 52, 9 S.W. 435 (1888);

McFarlane v. Grober, 70 Ark. 371, 69 S.W. 56 (1902) (decision under prior law).

**Common Ancestor.**

Degrees of relationship are counted by the number of degrees removed from the common ancestor. Carton v. Missouri Pac. R.R., 315 Ark. 5, 865 S.W.2d 635 (1993).

**Second Degree.**

First cousins are related in the second degree of consanguinity. Morton v. Benton Publishing Co., 291 Ark. 620, 727 S.W.2d 824 (1987).

**28-9-213. Kinsmen of the half blood.**

An intestate's kinsmen of the half blood will inherit the intestate's real or personal property to the same extent as if they were the intestate's kinsmen of the whole blood.

**History.** Acts 1969, No. 303, § 15; A.S.A. 1947, § 61-145.

CASE NOTES

ANALYSIS

Class of Heirs.  
Proof of Marriage.

**Class of Heirs.**

Where one group of claimants of heirship were related to the decedent as descendants of the decedent's maternal grandfather and another group was descendant only from one of her maternal

great-grandfathers, the descendants of the grandfather inherited to the exclusion of the descendants of the great-grandfather. Locke v. Cook, 245 Ark. 787, 434 S.W.2d 598 (1968) (decision under prior law).

**Proof of Marriage.**

In proceeding to determine heirship, half brother was entitled to share estate with nephew even though no certificate of



marriage was introduced showing a second marriage of father of deceased where there was substantial evidence showing a second marriage actually existed and proof of birth of half brother as result of

second marriage by a birth certificate filed prior to death of deceased. *Butler v. Alldredge*, 219 Ark. 197, 242 S.W.2d 136 (1951) (decision under prior law).

### **28-9-214. Tables of descents.**

The heritable estate of an intestate as defined in § 28-9-206 shall pass as follows upon the intestate's death:

(1) First, to the children of the intestate and the descendants of each child of the intestate who may have predeceased the intestate. The children and descendants will take per capita or per stirpes according to §§ 28-9-204 and 28-9-205;

(2) Second, if the intestate is survived by no descendant, to the intestate's surviving spouse unless the intestate and the surviving spouse had been continuously married less than three (3) years next preceding the death of the intestate, in which event the surviving spouse will take merely fifty percent (50%) of the intestate's heritable estate;

(3) Third, if the intestate is survived by no descendant or spouse, to the intestate's surviving parents, sharing equally, or to the sole surviving parent if only one (1) of them shall be living;

(4) Fourth, if the intestate is survived by no descendant but is survived by a spouse to whom the intestate has been continuously married less than three (3) years next preceding the death of the intestate, the entire portion of his or her heritable estate which does not pass to the surviving spouse under subdivision (2) of this section shall pass to the intestate's surviving parents, sharing equally, or to the sole surviving parent if only one (1) of them shall be living;

(5) Fifth, if the intestate is survived by no descendant or parent, then all of his or her heritable estate which under subdivisions (3) and (4) of this section would have vested in the intestate's surviving parent or parents will pass to the intestate's brothers and sisters and the descendants of any brothers and sisters of the intestate who may have predeceased the intestate, such brothers, sisters, and descendants taking per capita or per stirpes according to §§ 28-9-204 and 28-9-205;

(6) Sixth, if the intestate is survived by no descendant, then in respect to such portion of his or her heritable estate as does not pass under subdivisions (2)-(5) of this section, the inheriting class will be the surviving grandparents, uncles, and aunts of the intestate. In this situation, each surviving grandparent shall take the same share as each surviving uncle and aunt, and no distinction shall be made between the paternal and maternal sides. In other words, a maternal grandparent, uncle, or aunt shall take the same share as a paternal grandparent, uncle, or aunt and vice versa. If any uncle or aunt of the intestate shall predecease the intestate, the descendants of the deceased uncle or aunt will take, per capita or per stirpes according to §§ 28-9-204 and 28-9-205, the share the decedent would have taken if he or she had survived the intestate;



(7) Seventh, if the intestate is survived by no descendant, then in respect to the portion of his or her estate as does not pass under subdivisions (2)-(6) of this section, the inheriting class will be the surviving great-grandparents and great-uncles and great-aunts of the intestate. In this situation, each surviving great-grandparent shall take the same share as each surviving great-uncle and great-aunt, and no distinction shall be made between the paternal and maternal sides. In other words, a maternal great-grandparent, great-uncle, or great-aunt shall take the same share as a paternal great-grandparent, great-uncle, or great-aunt and vice versa. If any great-uncle or great-aunt shall predecease the intestate, the descendants of the decedent will take, per capita or per stirpes according to §§ 28-9-204 and 28-9-205, the share the decedent would have taken if he or she had survived the intestate; and

(8) Eighth, if heirs capable of inheriting the entire heritable estate cannot be found within the inheriting classes prescribed in subdivisions (1)-(7) of this section, the real and personal property of the intestate, or the portion not passing under those subdivisions, shall pass according to § 28-9-215, devolution when all or some portion of a heritable estate does not pass under this section.

**History.** Acts 1969, No. 303, § 19; A.S.A. 1947, § 61-149.

**Cross References.** Dower and curtesy, § 28-11-101 et seq.

RESEARCH REFERENCES

**Ark. L. Rev.** Estate Planning with Disclaimers in Arkansas, 27 Ark. L. Rev. 411.

**U. Ark. Little Rock L.J.** Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

CASE NOTES

ANALYSIS

Abandonment of Marriage.  
Conflict of Laws.  
Devolution of Intestate's Property.  
Disclaimer by Heirs.  
Escheat.  
Intestate Succession.  
Per Capita Distribution Proper.

**Abandonment of Marriage.**  
In a suit to contest a will, where no evidence was shown and no contention was made that the divorce and remarriage intervened between the time of marriage and the death of husband, the court was right in refusing to hear that the widow had abandoned her marriage with the decedent and thus was not "continuously

married." Mabry v. Mabry, 259 Ark. 622, 535 S.W.2d 824 (1976).

**Conflict of Laws.**  
Inheritance is governed by the *lex rei sitae*. Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S.W. 908 (1912); Wilson v. Storthz, 117 Ark. 418, 175 S.W. 45 (1915) (decision under prior law).

**Devolution of Intestate's Property.**  
The distinction between ancestral estates and new acquisitions in the devolution of property by intestacy was abolished in Arkansas by Acts 1969, No. 303 and has not been reinstated. Accordingly, where a decedent died intestate and without descendants in 1982, the decedent's property, which consisted principally of lands that were formerly owned by her

late father, all went to her surviving husband, to whom she had been married for 53 years. *Heath v. Clear*, 280 Ark. 482, 659 S.W.2d 504 (1983).

### **Disclaimer by Heirs.**

Where the four children of the intestate who were alive at his death and the five children of a son who predeceased him had executed disclaimers of interest in the estate with the purpose of having certain property pass to his widow as the surviving spouse, but the other 12 grandchildren and 10 great grandchildren did not execute disclaimers, the property in question did not pass to the widow because under this section the estate would pass to the widow only if there were no surviving descendants. The disclaimers in this case resulted in the property in issue passing to the 12 grandchildren and 10 great grandchildren who did not execute disclaimers and not to the widow as the surviving spouse. *Hunt v. United States*, 566 F. Supp. 356 (E.D. Ark. 1983).

### **Escheat.**

Escheat occurs immediately upon the death of the intestate, not when the probate court enters its order finding the estate must escheat. *Newton County v. West*, 293 Ark. 461, 739 S.W.2d 141 (1987).

### **Intestate Succession.**

In a case seeking to determine heirship, a surviving spouse was properly awarded a one-sixth interest in property, even

though she had waived her right to dower in a conveyance, because she received her interest after the death of her husband, pursuant to subdivision (2) of this section. *Scroggin v. Scroggin*, 103 Ark. App. 144, 286 S.W.3d 758 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 743 (Oct. 22, 2008), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 502 (Mar. 19, 2009).

### **Per Capita Distribution Proper.**

In a probate dispute regarding the estate of the decedent, because the decedent's aunts, uncles, and grandparents had predeceased her, the per capita distribution of the estate at the first-cousin level under § 28-9-205(a)(2) was proper as it was the first level at which the intestate had surviving heirs, regardless of what level was used to determine the inheriting class under this section. *Stokan v. Estate of Cann*, 100 Ark. App. 216, 266 S.W.3d 210 (2007).

**Cited:** *McDonald v. Petty*, 254 Ark. 705, 496 S.W.2d 365 (1973); *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974); *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979); *Wilson v. Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982); *Smith v. Wright*, 300 Ark. 416, 779 S.W.2d 177 (1989); *Wisdom v. McBride*, 311 Ark. 492, 845 S.W.2d 6 (1993); *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998); *Cockrum v. Fox*, 359 Ark. 508, 199 S.W.3d 69 (2004); *Dotson v. Dotson*, 2009 Ark. App. 819, — S.W.3d — (2009).

## **28-9-215. Devolution where no heir under § 28-9-214.**

If an heir to the heritable estate, or some portion thereof, cannot be found under § 28-9-214, then the portion of the heritable estate as does not pass under § 28-9-214 will pass as follows:

(1) First, to the surviving spouse of the intestate even though they had been married less than three (3) years;

(2)(A) Second, if there is no such surviving spouse, to the heirs, determined as of the date of the intestate's death in accordance with § 28-9-214, of the intestate's deceased spouse, meaning the spouse to whom the intestate was last married if there had been more than one (1) marriage.

(B) However, in case a marriage was terminated by divorce rather than by death, the heirs of the divorced spouse shall not inherit; and

(3) Third, if there is no person capable of inheriting under subdivision (1) or (2) of this section, the estate shall escheat to the county wherein the decedent resided at death.



**History.** Acts 1969, No. 303, § 20; 1985, No. 703, § 1; A.S.A. 1947, § 61-150.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Probate, 8 U. Ark. Little Rock L.J. 597.

Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Suc-

cession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

CASE NOTES

ANALYSIS	
Burden of Proof. Escheat.	v. Comstock, 108 Ark. 515, 159 S.W. 1097 (1913) (decision under prior law).
<b>Burden of Proof.</b> The proof need not show to a certainty that the deceased left no other heirs and the testimony of a widow alone raises a prima facie case in her own favor, throwing the burden of proof upon a stranger to show that there were other heirs. Carrier	<b>Escheat.</b> Escheat occurs immediately upon the death of the intestate, not when the probate court enters its order finding the estate must escheat. Newton County v. West, 293 Ark. 461, 739 S.W.2d 141 (1987). <b>Cited:</b> Wilson v. Kemp, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

28-9-216. Advancements.

- (a) If a person dies intestate as to all his or her estate, property which he or she gave in his or her lifetime to an heir shall be treated as an advancement against the heir's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement.
- (b) For this purpose, the property advanced shall be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs.
- (c) If the recipient of the property fails to survive the decedent, the property shall not be taken into account in computing the share of the recipient's descendants.

**History.** Acts 1969, No. 303, § 23; A.S.A. 1947, § 61-153.

CASE NOTES

ANALYSIS	Value of Insurance Policy.
Definition. Intention. Nominal Consideration. Presumption. Testate Estates.	<b>Definition.</b> An "advancement" is a gift by a parent to a child in anticipation of what it is supposed the child will be entitled to on the death of the parent. Holland v. Bon-



ner, 142 Ark. 214, 218 S.W. 665, 26 A.L.R. 1101 (1920) (decision under prior law).

### **Intention.**

Whether a conveyance or transfer of money or property by a parent to a child is an advancement or a gift depends on the intention of the parties, and if it appears that a gift is intended, it will not be treated as an advancement. *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665, 26 A.L.R. 1101 (1920) (decision under prior law).

### **Nominal Consideration.**

Proof that a parent conveyed land worth from \$6,000 to \$8,000 for \$500 was held a prima facie case of advancement to the extent at least of the difference between the consideration expressed and the real value of the land conveyed. *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665, 26 A.L.R. 1101 (1920) (decision under prior law).

Where consideration was nominal and deed was not recorded until grantor's death more than a year after execution, court was justified in holding that presumption of law as to advancements had not been overcome. *Neal v. Neal*, 194 Ark. 226, 106 S.W.2d 595 (1937) (decision under prior law).

### **Presumption.**

In the absence of clear evidence to the contrary, a gift of a horse and of an insurance policy from a father to his daughter was presumed to be an advancement. *Cul-*

*berhouse v. Culberhouse*, 68 Ark. 405, 59 S.W. 38 (1900) (decision under prior law).

A voluntary conveyance of land by a father to his son will, in the absence of evidence to the contrary, be presumed to be an advancement. *Goodwin v. Parnell*, 69 Ark. 629, 65 S.W. 427 (1901) (decision under prior law).

The presumption is that conveyances from a father to his daughters are intended as advancements. *Jackson v. Richardson*, 182 Ark. 997, 33 S.W.2d 1095 (1930) (decision under prior law).

Where a parent makes a voluntary conveyance or gift to his child, the law presumes that it is an advancement and that the parent intends that all his children shall equally share not only in what remains at his death, but in all that came from him. *Neal v. Neal*, 194 Ark. 226, 106 S.W.2d 595 (1937) (decision under prior law).

### **Testate Estates.**

The doctrine of advancements does not apply to testate estates. *Blanks v. Clark*, 68 Ark. 98, 56 S.W. 1063 (1900) (decision under prior law).

### **Value of Insurance Policy.**

The value of an advancement of a policy of life insurance payable to a daughter at her father's death was to be estimated as of the time when her right of beneficial enjoyment accrued, which was at the death of the insured. *Culberhouse v. Culberhouse*, 68 Ark. 405, 59 S.W. 38 (1900) (decision under prior law).

## **28-9-217. Debts to decedent.**

A debt owed to the decedent shall not be charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the share of the debtor's descendants.

**History.** Acts 1969, No. 303, § 24; A.S.A. 1947, § 61-154.

## **CASE NOTES**

### **Debts.**

The interest of an heir in his ancestor's real estate descends to him free from his general debts to his intestate. *Wheeler & Motter Mercantile Co. v. Knox*, 136 Ark. 95, 206 S.W. 46 (1918) (decision under prior law).

Children inherit property subject to debts and dower. *Yeates v. Yeates*, 179 Ark. 543, 16 S.W.2d 996, 65 A.L.R. 466 (1929) (decision under prior law).

**28-9-218. Doctrine of first purchaser abolished.**

This subchapter is intended to abolish the common law rule of the blood of the first purchaser under which in the case of successive inheritances of land the intestate's property would descend only to such of his or her heirs as were of the blood of the next preceding ancestor in the line of successive descents who acquired title by purchase, that is to say, by any method other than descent.

**History.** Acts 1969, No. 303, § 16;  
A.S.A. 1947, § 61-146.

**28-9-219. Distinction between ancestral estates and new acquisitions abolished.**

(a) Only for the purposes of intestate succession, the distinction between "ancestral estate" and "new acquisitions" in respect to real estate owned by an intestate is abolished.

(b) The devolution of real estate and personal property which the intestate acquired by gift, devise, or descent from some ancestor shall be controlled by the same rules which apply to the devolution of real estate and personal property acquired by the intestate in any other manner.

**History.** Acts 1969, No. 303, § 18;  
A.S.A. 1947, § 61-148.

**CASE NOTES****Devolution of Intestate's Property.**

The distinction between ancestral estates and new acquisitions in the devolution of property by intestacy was abolished in Arkansas by Acts 1969, No. 303 and has not been reinstated. Accordingly, where a decedent died intestate and with-

out descendants in 1982, the decedent's property, which consisted principally of lands that were formerly owned by her late father, all went to her surviving husband. *Heath v. Clear*, 280 Ark. 482, 659 S.W.2d 504 (1983).

**28-9-220. Conveyance to heirs or next of kin — Doctrine of worthier title abolished.**

(a) When any property is limited, mediately or immediately, in an otherwise effective testamentary conveyance, in form or in effect, to the heirs or next of kin of the conveyor, or to a person or persons who on the death of the conveyor are some or all of his or her heirs or next of kin, the conveyees acquire the property by purchase and not by descent.

(b) When any property is limited in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one (1) or more prior interests in favor of a person or persons in existence, the conveyance operates in favor of such heirs or next of kin by purchase and not by descent.

**History.** Acts 1969, No. 303, §§ 21, 22; A.S.A. 1947, §§ 61-151, 61-152.

### CASE NOTES

**Predeceased Heir.**

Since the provisions of this section do not take effect until the death of the testator, where the residuary clause of the will of testator left all property to a brother who survived testator and to a

sister who predeceased testator, the sister could not have been an heir of the testator at the time of his death for she had already died. *Eckert Heirs v. Harlow*, 251 Ark. 1018, 476 S.W.2d 244 (1972).

## CHAPTER 10 UNIFORM SIMULTANEOUS DEATH ACT

SUBCHAPTER.

1. UNIFORM SIMULTANEOUS DEATH ACT. [REPEALED.]
2. UNIFORM SIMULTANEOUS DEATH ACT (2005).

### RESEARCH REFERENCES

**Am. Jur.** 23 Am. Jur. 2d, Desc. & D., §§ 56-58.

**Ark. L. Rev.** Some Practical Aspects to Drafting in the Estate Planning Field, 21 Ark. L. Rev. 5.

**C.J.S.** 26B C.J.S., Desc. & D., §§ 14, 15.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

### SUBCHAPTER 1 — UNIFORM SIMULTANEOUS DEATH ACT

SECTION.

28-10-101 — 28-10-112. [Repealed.]

**A.C.R.C. Notes.** Because of the enactment of subchapter 2 of this chapter by Acts 2005, No. 74, the existing provisions of this chapter have been designated as subchapter 1.

Acts 2005, No. 74, § 2, provided: “Effective date of repeal. Except as provided in

§ 28-10-211, §§ 28-10-101 — 28-10-112 shall be repealed and superseded by §§ 28-10-201 — 28-10-211 on January 1, 2006.”

**Effective Dates.** Acts 2005, No. 74, § 3: Jan. 1, 2006, by its own terms.

### 28-10-101 — 28-10-112. [Repealed.]

**Effective Dates.** Acts 2005, No. 74, § 3: repeal effective by its own terms January 1, 2006.

**Publisher’s Notes.** This subchapter was repealed by Acts 2005, No. 74, § 3, effective January 1, 2006. The subchapter



was derived from the following sources:

28-10-101. Acts 1941, No. 15, § 1; A.S.A. 1947, § 61-124.

28-10-102. Acts 1941, No. 15, § 2; 1959, No. 203, § 1; A.S.A. 1947, § 61-125.

28-10-103. Acts 1941, No. 15, § 3; 1959, No. 203, § 2; A.S.A. 1947, § 61-126.

28-10-104. This was originally a reserved section, because Section 4 of the Uniform Simultaneous Death Act (U.L.A.), which provides for the distribution of community property, was not enacted by Acts 1941, No. 15.

28-10-105. Acts 1941, No. 15, § 4; A.S.A. 1947, § 61-127.

28-10-106. Acts 1941, No. 15, § 5; A.S.A. 1947, § 61-127n.

28-10-107. Acts 1941, No. 15, § 6; 1959, No. 203, § 3; A.S.A. 1947, § 61-128.

28-10-108. Acts 1941, No. 15, § 7; A.S.A. 1947, § 61-129.

28-10-109. Acts 1941, No. 15, § 8; A.S.A. 1947, § 61-130.

28-10-110. Acts 1941, No. 15, § 9; A.S.A. 1947, § 61-130n.

28-10-111. Acts 1941, No. 15, § 10; A.S.A. 1947, § 61-130n.

28-10-112. This was originally a reserved section, because Section 11 of the Uniform Simultaneous Death Act (U.L.A.), which is an effective date provision, was not enacted by Acts 1941, No. 15.

## SUBCHAPTER 2 — UNIFORM SIMULTANEOUS DEATH ACT (2005)

### SECTION.

28-10-201. Definitions.

28-10-202. Requirement of survival by 120 hours under probate code.

28-10-203. Requirement of survival by 120 hours under governing instruments.

28-10-204. Co-owners with right of survivorship — Requirement of survival by 120 hours.

28-10-205. Evidence of death or status.

### SECTION.

28-10-206. Exceptions.

28-10-207. Protection of payors, bona fide purchasers, and other third parties — Personal liability of recipient.

28-10-208. Uniformity of application and construction.

28-10-209. Short title.

28-10-210. [Reserved.]

28-10-211. Severability clause.

28-10-212. Effective date.

**Effective Dates.** Acts 2005, No. 74, § 1 provided: "Effective date.

"(a) This subchapter takes effect January 1, 2006.

"(b) On the effective date of this subchapter:

"(1) an act done before the effective date in any proceeding and any accrued right is not impaired by this subchapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right; and

"(2) any rule of construction or presumption provided in this subchapter applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent."

Acts 2007, No. 240, § 5: Mar. 9, 2007. Emergency clause provided: "It is found

and determined by the General Assembly of the State of Arkansas that the current extremely harsh remedy under the rule against perpetuities that renders a grantor's entire grant void if the grant violates the rule is outdated and should be replaced; that the common law rule fosters litigation at great cost to the citizens of this state because of its many complexities, with often devastating consequences to estates; and that the revision by this act of the common law remedy to permit the likely occurrence that a grant will vest or to permit a court to reform a grant that does not vest in the manner that most likely approximate the transferor's manifested plan is immediately necessary for the good of the citizens of this state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by

the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

## **28-10-201. Definitions.**

In this subchapter:

(1) “Co-owners with right of survivorship” includes joint tenants, tenants by the entirety, and other co-owners of property or accounts held under circumstances that entitle one (1) or more to the whole of the property or account on the death of the other or others.

(2) “Governing instrument” means a deed, will, trust, insurance or annuity policy, account with POD designation, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(3) “Payor” means a trustee, insurer, business entity, employer, government, governmental agency, subdivision, or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments.

**History.** Acts 2005, No. 74, § 1.

## **RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** Survey of assembly, Probate Law, 28 U. Ark. Little Rock L. Rev. 399.

## **28-10-202. Requirement of survival by 120 hours under probate code.**

Except as provided in § 28-10-206, if the title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead or family allowance depends upon an individual’s survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual. This section does not apply if its application would result in a taking of intestate estate by the state.

**History.** Acts 2005, No. 74, § 1.

## **28-10-203. Requirement of survival by 120 hours under governing instruments.**

Except as provided in § 28-10-206, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not



established by clear and convincing evidence to have survived the event by 120 hours is deemed to have predeceased the event.

**History.** Acts 2005, No. 74, § 1.

#### **28-10-204. Co-owners with right of survivorship — Requirement of survival by 120 hours.**

Except as provided in § 28-10-206, if: (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners.

**History.** Acts 2005, No. 74, § 1.

#### **28-10-205. Evidence of death or status.**

In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:

(1) Death occurs when an individual has sustained either: (1) irreversible cessation of circulatory and respiratory functions or (2) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards.

(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.

(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under paragraph (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which he or she has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His or her death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stipulated on a document described in paragraph (2) or (3), a document described



in paragraph (2) or (3) that stipulates a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.

**History.** Acts 2005, No. 74, § 1.

### **28-10-206. Exceptions.**

This subchapter does not apply if:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period;

(3) the imposition of 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under any rule against perpetuities; or

(4) the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition.

**History.** Acts 2005, No. 74, § 1; 2007, No. 240, § 4.

**A.C.R.C. Notes.** Section 6 of the Uniform Simultaneous Death Act (ULA 1993) begins as follows: "Survival by 120 hours

is not required if."

**Amendments.** The 2007 amendment substituted "any rule against perpetuities" for "the Rule Against Perpetuities" in (3).

### **28-10-207. Protection of payors, bona fide purchasers, and other third parties — Personal liability of recipient.**

(a)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a person designated in a governing instrument who, under this subchapter, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the person's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this subchapter. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this subchapter.

(2) Written notice of a claimed lack of entitlement under paragraph 1 must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this subchapter, a payor or other third party may pay

any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this subchapter, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(b)(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this subchapter to return the payment, item of property, or benefit nor liable under this subchapter for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this subchapter is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this subchapter.

(2) If this subchapter or any part of this subchapter is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this subchapter, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this subchapter is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this subchapter or part of this subchapter not preempted.

**History.** Acts 2005, No. 74, § 1.

### **28-10-208. Uniformity of application and construction.**

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

**History.** Acts 2005, No. 74, § 1.

### **28-10-209. Short title.**

This subchapter may be cited as the "Uniform Simultaneous Death Act (2005)".

**History.** Acts 2005, No. 74, § 1.

**28-10-210. [Reserved.]**

**A.C.R.C. Notes.** Section 10 of the Uniform Simultaneous Death Act (ULA 1993), a repealing section, was not adopted in Arkansas.

**28-10-211. Severability clause.**

If any provision of this subchapter or its application to any persons or circumstance is held invalid, the invalidity does not affect other provisions or applications of the subchapter which can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

**History.** Acts 2005, No. 74, § 1.

**28-10-212. Effective date.**

(a) This subchapter takes effect January 1, 2006.

(b) On the effective date of this subchapter:

(1) an act done before the effective date in any proceeding and any accrued right is not impaired by this subchapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before the effective date, the provisions remain in force with respect to that right; and

(2) any rule of construction or presumption provided in this subchapter applies to instruments executed and multiple-party accounts opened before the effective date unless there is a clear indication of a contrary intent.

**History.** Acts 2005, No. 74, § 1.

## CHAPTER 11

### DOWER AND CURTESY

**SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. ENTITLEMENT GENERALLY.
3. EXTENT OF INTEREST.
4. PROVISIONS IN LIEU OF DOWER OR CURTESY.

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#### RESEARCH REFERENCES

**Am. Jur.** 25 Am. Jur. 2d, Dower, § 1 et seq.

**Ark. L. Rev.** Real Property — Requirement of Seisin as Basis for Award of Dower, 4 Ark. L. Rev. 246.

Real Property — Dower — Vesting of Title to Realty in Heirs of Intestate, 6 Ark. L. Rev. 67.

Medieval Law in the Age of Space: Some “Rules of Property” in Arkansas, 22 Ark. L. Rev. 248.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Estate Planning with Disclaimers in Arkansas, 27 Ark. L. Rev. 411.



C.J.S. 28 C.J.S., Dower & Curtesy, § 1 et seq.

U. Ark. Little Rock L.J. Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

Note, Property — Dower — Specific Performance Is Allowed. Box v. Dudeck, 265 Ark. 165, 578 S.W.2d 567 (1979), 3 U. Ark. Little Rock L.J. 495.

Note, Constitutional Law — Equal Protection — Arkansas' Gender-Based Statutes on Dower, Election, Statutory Allowances, and Homestead Are Unconstitutional, Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981); Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), 4 U. Ark. Little Rock L.J. 361.

Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.

Survey of Arkansas Law, Decedents' Estates, 5 U. Ark. Little Rock L.J. 135.

Cathey, The Real Estate Installment Sale Contract: Its Drafting, Use, Enforcement, and Consequences, 5 U. Ark. Little Rock L.J. 229.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

28-11-101. Definition.

28-11-102. Descent of land upon death of spouse having dower or curtesy interest.

Effective Dates. Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

28-11-101. Definition.

As used in this chapter, "endowed" means invested and shall apply both to dower and curtesy.

History. Rev. Stat., ch. 52, § 1; C. & M. Dig., § 3514; Pope's Dig., § 4396; Acts 1981, No. 714, § 18; A.S.A. 1947, § 61-201.

RESEARCH REFERENCES

Ark. L. Rev. Comment, Arkansas Marriage: A Partnership Between a Husband and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

## CASE NOTES

**Cited:** United States v. 339.77 Acres of Land, 240 F. Supp. 545 (W.D. Ark. 1965); Owen v. Owen, 267 Ark. 532, 592 S.W.2d 120 (1980); Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981).

### 28-11-102. Descent of land upon death of spouse having dower or curtesy interest.

At the death of any surviving spouse who has dower or curtesy for life in land, the property shall descend in accordance with the will of the first deceased spouse or, if the first spouse died intestate, then to descend in accordance with the law for the distribution of intestates' estates.

**History.** Rev. Stat., ch. 52, § 22; C. & M. Dig., § 3537; Pope's Dig., § 4423; Acts 1981, No. 714, § 39; A.S.A. 1947, § 61-227.

## SUBCHAPTER 2 — ENTITLEMENT GENERALLY

## SECTION.

28-11-201. Actions of spouse not to bar right to dower or curtesy.

28-11-202. Surviving spouse of alien entitled to dower or curtesy.

## SECTION.

28-11-203. Right of dower and curtesy barred.

28-11-204. Murder of spouse — Effect.

**Effective Dates.** Acts 1935, No. 84, § 3: approved Feb. 26, 1935. Emergency clause provided: "Because certain Federal and State lending agencies are finding it difficult to place a construction on the meaning of Act 315 of 1923 and, therefore, it creating some confusion relative to the usage of this act and, thereby prohibiting numerous citizens from securing loans because of such defects in their titles; this act, therefore, being necessary for the immediate preservation of the public peace, health and safety; an emergency is hereby declared to exist and this act shall take effect and be in full force from and after its passage."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law

relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

## RESEARCH REFERENCES

U. Ark. Little Rock L.J. Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.

**28-11-201. Actions of spouse not to bar right to dower or curtesy.**

(a) No act, deed, or conveyance executed or performed by one (1) spouse without the assent of the other spouse, evinced by acknowledgment in the manner required by law, shall pass the estate of dower or curtesy.

(b) No judgment, default, covin, or crime of one (1) spouse shall prejudice the right of the other spouse to curtesy or dower, or preclude either spouse from the recovery thereof, if otherwise entitled thereto.

**History.** Rev. Stat., ch. 52, § 16; C. & M. Dig., § 3529; Pope's Dig., § 4413; Acts 1981, No. 714, § 25; A.S.A. 1947, § 61-208.

**Publisher's Notes.** Acts 1939, No. 313, § 2, as amended by Acts 1943, No. 69, § 1, which were repealed by Acts 1981, No. 714, § 41, provided in part that a married woman could freely dispose of any prop-

erty which she owned in her own name and of her own separate estate without her husband joining in the deed, conveyance, etc., affecting the title to the property. Acts 1943, No. 69, § 2, validated all sales and conveyances made theretofore by any married woman of such property whether or not her husband joined in the conveyance or act of sale.

**CASE NOTES****ANALYSIS**

Constitutionality.

Right of Dower.

**Constitutionality.**

The operation of the dower provisions under §§ 28-11-301, 28-11-307, and this section which gave the wife the right of dower which could not be defeated by a husband's conveyance and the comparable curtesy statutes under former §§ 61-228 (repealed) and 61-229 (repealed) which allowed the wife to defeat curtesy by conveyance provided for dissimilar treatment for men and women similarly situated, and since there was no justification for the discrimination, § 28-11-307 and this section were held unconstitutional. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981) (decision prior to 1981 amendment).

This section was a gender based statute which did not serve an important govern-

mental function; thus it was held unconstitutional, since it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision prior to 1981 amendment).

**Right of Dower.**

A spouse has the right to make a will which excludes the surviving spouse or provides for a bequest or devise in lieu of dower; that a surviving spouse may take against a will prevents any injustice that might result from the spouse's exercise of that right. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

The making of a will which excludes the surviving spouse is not an "act" which impermissibly defeats the right of dower under this section. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

**28-11-202. Surviving spouse of alien entitled to dower or curtesy.**

The surviving spouse of an alien shall be entitled to dower in the estate of the deceased spouse in the same manner as if the alien had been a native-born citizen of this state.



**History.** Acts 1939, No. 313, § 4; A.S.A. 1947, § 61-231.

**Cross References.** Aliens' right to receive property, § 18-11-101.

### 28-11-203. Right of dower and curtesy barred.

(a) The inchoate right of dower or curtesy of any spouse in real property in the State of Arkansas is barred in all cases when or where the other spouse has been barred of title or of any interest in the property for seven (7) years or more and also in real property or interest conveyed by the husband or wife but not signed by the other spouse when the conveyance is made or has been made for a period of seven (7) years or more.

(b)(1) This section shall affect the inchoate right of dower and curtesy of a spouse in real property in this state only where or when the husband or wife has been barred of title for seven (7) years or more, or when a conveyance by the husband or wife, without the signature of the other spouse, has been made for a period of seven (7) years or more.

(2) However, this section shall not apply unless the instrument of conveyance by the husband or wife has been of record for at least seven (7) years.

**History.** Acts 1935, No. 84, § 1; Pope's Dig., §§ 4414, 8919; Acts 1981, No. 714, § 38; A.S.A. 1947, § 61-226.

## CASE NOTES

### ANALYSIS

Constitutionality.

In General.

Contract to Convey Land.

Mortgage Foreclosures.

Sale Under Execution.

### Constitutionality.

Since the wife's inchoate right of dower was not a vested right, it was not protected from legislative impairment by guaranties for protection of property or rights of citizens. *Skelly Oil Co. v. Murphy*, 180 Ark. 1023, 24 S.W.2d 314 (1930) (decision under prior law).

### In General.

Where husband, pursuant to contract, sold land to which he held legal title and wife refused to release her inchoate right of dower, decree protecting dower rights of wife would be conditioned upon husband

predeceasing her within seven years from date of decree. *Fletcher v. Felker*, 97 F. Supp. 755 (W.D. Ark. 1951).

### Contract to Convey Land.

A mere contract to convey some land, signed only by the husband, does not cause this section to become operative. *Smith v. Smith*, 268 Ark. 993, 597 S.W.2d 848 (Ct. App. 1980).

### Mortgage Foreclosures.

This section applies to actions to recover land and does not govern suits to foreclose mortgages. *White v. White*, 198 Ark. 740, 131 S.W.2d 4 (1939).

### Sale Under Execution.

Sale of husband's land during his lifetime under execution against him did not defeat the claim of his widow, within seven years of his death, to her dower interest therein. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

## 28-11-204. Murder of spouse — Effect.

Whenever a spouse shall kill or slay his or her spouse and the killing or slaying would under the law constitute murder, either in the first or second degree, and that spouse shall be convicted of murder for the killing or slaying, in either the first or second degree, the one so convicted shall not be endowed in the real or personal estate of the decedent spouse so killed or slain.

**History.** Acts 1939, No. 313, § 3; A.S.A. 1947, § 61-230.

### RESEARCH REFERENCES

**Ark. L. Rev.** Wills — Descent and Distribution — Right of Felonious Killer to Participate in Estate of Person Killed, 7 Ark. L. Rev. 416.

Decedent's Estates: Share of Murderer and His Heirs in Victim's Estate, 24 Ark. L. Rev. 348.

Notes, Estate of Sargent v. Benton State Bank: Judicial Limitations on a Slayer's Right to Inherit from the Decedent, 38 Ark. L. Rev. 653.

### CASE NOTES

#### ANALYSIS

Applicability.  
Evidence.  
Necessity for Conviction.  
Rule on Profiting from Crime.

#### Applicability.

This section was intended to apply only to dower and curtesy and does not apply to a widow's claim for statutory allowance where she is convicted of the murder of her husband. However, apart from this section, the principle that one who wrongfully kills another will not be permitted to share in the other's estate or otherwise profit from the crime will apply to such a situation. *Smith v. Dean*, 226 Ark. 438, 290 S.W.2d 439 (1956), overruled, *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (Ark. 1999).

This section was not applicable where the insured and his beneficiary wife were found together dead of gunshot wounds without evidence as to who died first or that the insured had killed his wife and then committed suicide. *Belt v. Baser*, 238 Ark. 644, 383 S.W.2d 657 (1964).

#### Evidence.

Where the husband was living with his wife at the time of her death and there is

no evidence either that he had anything to do with the death of his wife or that he had abandoned her, a court commits error in holding that the husband forfeited his right of curtesy in his wife's estate. *Phipps v. Wilson*, 251 Ark. 377, 472 S.W.2d 929 (1971).

#### Necessity for Conviction.

Where a wife committed suicide shortly after killing her husband and consequently was not tried or convicted, this section did not exclude her heirs from asserting dower in her husband's property. *Barnes v. Cooper*, 204 Ark. 118, 161 S.W.2d 8 (1942).

#### Rule on Profiting from Crime.

One who wrongfully kills another is not permitted to profit by the crime; the purpose underlying this general rule is to deter such conduct. However, the rule is inapplicable where the wrongdoer stands to gain nothing by his actions, as where he kills himself too. *Luecke v. Mercantile Bank*, 286 Ark. 304, 691 S.W.2d 843 (1985).

**Cited:** *Belt v. Baser*, 238 Ark. 644, 383 S.W.2d 657 (1964); *Wright v. Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970).

SUBCHAPTER 3 — EXTENT OF INTEREST

SECTION.

- 28-11-301. Land generally.
- 28-11-302. Lands exchanged — Election.
- 28-11-303. Mortgaged land.
- 28-11-304. Sale of timber, oil, gas, or mineral leases.

SECTION.

- 28-11-305. Personalty.
- 28-11-306. Bonds, notes, accounts, and evidences of debt.
- 28-11-307. Dower or curtesy when no children.

**Cross References.** Life interests and remainders, determination of present value, § 18-2-101 et seq.

**Effective Dates.** Acts 1859, No. 231, § 1: effective on passage.

Acts 1891, No. 65, § 2: effective on passage.

Acts 1945, No. 143, § 4: Mar. 2, 1945. Emergency clause provided: “Due to the fact that a widow’s dower has never been defined as provided by this act and many widows are being deprived of their dower rights in the sale of timber, oil, gas or mineral rights, an emergency is hereby declared to exist and this act shall be in full force and effect from and after the date of its passage and approval.”

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: “It has been found and is declared by the General

Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent’s estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.”

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Averill & Brantley, A Comparison of Arkansas’s Current Law Concerning Succession,

Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

28-11-301. Land generally.

(a) If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be endowed of the third part of all the lands for life whereof his or her spouse was seized, of an estate of inheritance, at any time during the marriage, unless the endowment shall have been relinquished in legal form.

(b) A person shall have a dower or curtesy right in lands sold in the lifetime of his or her spouse without consent of the spouse in legal form against all creditors of the estate.

**History.** Rev. Stat., ch. 52, §§ 1, 28; C. & M. Dig., §§ 3514, 3543; Pope’s Dig.,

§§ 4396, 4429; Acts 1981, No. 714, §§ 18, 24; A.S.A. 1947, §§ 61-201, 61-207.



## RESEARCH REFERENCES

**Ark. L. Rev. Comment**, Arkansas Marriage: A Partnership Between a Husband

and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

## CASE NOTES

## ANALYSIS

Constitutionality.  
 Alienation of Inchoate Right.  
 Bigamous Marriage.  
 Conflict of Laws.  
 Conveyance by Husband.  
 Divorce.  
 Federal Estate Tax.  
 Improvements.  
 Judicial Sale.  
 Lands Subject to Dower.  
 Mortgaged Lands.  
 Nature of Dower.  
 Oil and Gas Interests.  
 Partnership Property.  
 Priority Over Creditors.  
 Proceeds of Land Sold.  
 Redemption of Lands.  
 Relinquishment.  
 Sale Under Execution.  
 Seizen.

**Constitutionality.**

The operation of the dower provisions under subsection (b) of this section, § 28-11-201, and § 28-11-307 which gave the wife the right of dower which could not be defeated by a husband's conveyance and the comparable curtesy statutes under former §§ 61-228 (repealed) and 61-229 (repealed) which allowed the wife to defeat curtesy by conveyance provided for dissimilar treatment for men and women similarly situated and there was no justification for the discrimination. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981) (decision prior to 1981 amendment).

Subsection (a) of this section which was gender based and did not serve an important governmental function was held unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981); *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983) (decision prior to 1981 amendment).

Subsection (b) of this section, which gave a wife a dower interest in property

which her husband may have disposed of during the marriage without her consent, but did not give the husband equal rights to her property, was a gender based statute which did not serve an important governmental function and thus was unconstitutional since it violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision prior to 1981 amendment).

Where decedent died intestate, widow's claim of dower to a part of his real property under subsection (a) of this section was the exact equivalent of the rights of curtesy under former § 61-228 (repealed), which he could have enjoyed had he survived his wife; hence, there was no impingement of the equal protection clause, as there was no discrimination in favor of either sex where the deceased spouse died intestate. *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983) (decision prior to 1981 amendment).

The statement, in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), that subsection (a) of this section was unconstitutional was too broad and extended beyond the holding reached in *Stokes*, supra, which was that where a husband died testate the wife could not take dower against the will, there being no concomitant benefit given to husbands under the law the statement should have been qualified by the provisional wording that the statute was unconstitutional "as applied in this case." *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983) (decision prior to 1981 amendment).

Dower and curtesy statutes, as they existed prior to 1981 amendments, were valid in cases of intestacy because there was no difference between the dower of a surviving wife and the curtesy of a surviving husband. *Dent v. Rose*, 281 Ark. 42, 661 S.W.2d 361 (1983) (decision prior to 1981 amendment).

### **Alienation of Inchoate Right.**

A widow may make an equitable transfer of her unassigned dower. *Griffin v. Dunn*, 79 Ark. 408, 96 S.W. 190 (1906); *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909).

Unassigned dower is not alienable at law. *Flowers v. Flowers*, 84 Ark. 557, 106 S.W. 949 (1907).

### **Bigamous Marriage.**

In the absence of divorce, a married woman is entitled to dower, although she has contracted a second and bigamous marriage. *Grober v. Clements*, 71 Ark. 565, 76 S.W. 555 (1903).

### **Conflict of Laws.**

The right to dower is governed by the law of the place where the lands are situated. *Apperson v. Bolton*, 29 Ark. 418 (1874).

### **Conveyance by Husband.**

Dower is not barred by a conveyance by the husband. *Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908).

Inchoate dower interest held by defendant's wife in non-homestead property did not preclude a finding that defendant could have obtained enough funds from sale of the property to pay legal fees in a criminal case; defendant was therefore required to reimburse the government for legal services provided under the Criminal Justice Act, 18 U.S.C.S. § 3006A. *United States v. Fincher*, 593 F.3d 702 (8th Cir. 2010).

### **Divorce.**

A divorce from the bond of matrimony bars the wife's right of dower. *Wood v. Wood*, 59 Ark. 441, 27 S.W. 641 (1894); *Kendall v. Crenshaw*, 116 Ark. 427, 173 S.W. 393 (1915); *Taylor v. Taylor*, 153 Ark. 206, 240 S.W. 6 (1922); *Moore v. Warren*, 160 Ark. 629, 255 S.W. 306 (1923).

### **Federal Estate Tax.**

Widow's dower in real estate is not to be reduced by federal estate tax. *Thompson v. Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S.W. 324 (1924), superseded by statute as stated in, *Terral v. Terral*, 212 Ark. 221, 205 S.W.2d 198 (1947).

### **Improvements.**

A widow is not entitled to dower in improvements made by a purchaser from her husband. *Welch v. McKenzie*, 66 Ark. 251, 50 S.W. 505 (1899).

A widow is not entitled to the value of improvements made upon lands sold without her consent. *Welch v. McKenzie*, 66 Ark. 251, 50 S.W. 505 (1899).

### **Judicial Sale.**

A widow's dower is not cut off by a probate sale for the payment of debts. *Livingston v. Cochran*, 33 Ark. 294 (1878).

The probate court cannot order a sale of any part of the lands free of dower. *Webb v. Smith*, 40 Ark. 17 (1882).

The forfeiture of land for taxes and the sale by the state after the time for redemption expires extinguishes the widow's right to dower. *McWhirter v. Roberts*, 40 Ark. 283 (1883).

Dower is not barred by a judicial sale, though the widow is a party to the suit, unless her dower was put in issue. *Fourche River Lumber Co. v. Walker*, 96 Ark. 540, 132 S.W. 451 (1910).

### **Lands Subject to Dower.**

There is no dower in lands held in joint tenancy. *Cockrill v. Armstrong*, 31 Ark. 580 (1876).

If a trustee has an interest in the trust estate, the wife is entitled to dower if it can be assigned without prejudice to the trust estate. *Cockrill v. Armstrong*, 31 Ark. 580 (1876).

Where the value of a widow's dower in all of her husband's lots is set apart to her in part of them, she has no claim to dower out of the remainder. *Rockafellow v. Peay*, 40 Ark. 69 (1882).

A widow is entitled to dower in estate pur autre vie as personalty. *Stull v. Graham*, 60 Ark. 461, 31 S.W. 46 (1895).

A widow is not entitled to dower in lands held in trust merely. *McKneely v. Terry*, 61 Ark. 527, 33 S.W. 953 (1896).

An estate in entirety is not subject to dower. *Roulston v. Hall*, 66 Ark. 305, 50 S.W. 690 (1899).

Land under lease and in tenant's possession at time of landlord's death is subject to widow's dower interest under rules relating to real property and not those relating to personalty. *Brack v. Coburn*, 210 Ark. 334, 196 S.W.2d 230 (1946).

### **Mortgaged Lands.**

The widow of a deceased mortgagor is not barred of dower in the mortgaged lands by a decree of foreclosure, though she was a party to the suit, unless her



right to dower was put in issue. *McWhirter v. Roberts*, 40 Ark. 283 (1883).

Where a wife joins her husband in a mortgage on land relinquishing her dower therein, after his death she only has dower interest subject to the mortgage, and has no right to compel the administrator to pay off the mortgage with the personal estate. *Hewitt v. Cox*, 55 Ark. 225, 15 S.W. 1026 (1891).

A mortgage upon a homestead accepted as security for an antecedent debt of the husband in consideration of which the time is extended for a definite period is valid to convey the wife's dower although the wife was induced to execute it by the misrepresentations of the officer who took her acknowledgment that mortgage did not cover the homestead where the mortgagee had no notice thereof. *Hill v. Yarborough*, 62 Ark. 320, 35 S.W. 433 (1896).

Dower is not barred by a mortgage in which wife did not join. *Lowe v. Walker*, 77 Ark. 103, 91 S.W. 22 (1905).

A widow's rights in land are subject to a mortgage existing at the time of her marriage, but an increase of indebtedness secured by the mortgage made after the marriage and in which she does not join would be void as against her. *Harris v. Mosley*, 195 Ark. 62, 111 S.W.2d 563 (1937).

### **Nature of Dower.**

A widow has dower for life of one-third of the real estate owned by her husband at any time during coverture, whether unsold at his death or sold or alienated by him without her consent in legal form, and one-third of all personal estate owned by him at his death, including money or cash on hand and choses in action, absolutely, unless he leaves no children, in which case her interest is one-half of each part instead of one-third. And this dower in each part she takes by way of a lien, created by and at the time of marriage, and paramount to creditors and purchasers, and without any regard to his debts. Her dower in each part is carved out of the specific estate of which he was possessed; and, if she has been deprived of it, she can follow it wherever it may be found, and subject it to her lien, unless by her own laches, she has abandoned or waived the right. *Hill's Adm'rs v. Mitchell*, 5 Ark. (5 Pike) 608 (1844).

While dower remains unascertained, and until there has been an actual admea-

surement by metes and bounds, it is a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law. *Pennington v. Yell*, 11 Ark. 212 (1850).

A widow takes dower under law existing at husband's death. *Hatcher v. Buford*, 60 Ark. 169, 29 S.W. 641 (1895); *Sanders v. Taylor*, 193 Ark. 1095, 104 S.W.2d 797 (1937).

Dower must be carved out of specific property. *Johnson v. Johnson*, 92 Ark. 292, 122 S.W. 656 (1909).

A widow does not hold as heir of her husband her dower interest in his lands. *Barton v. Wilson*, 116 Ark. 400, 172 S.W. 1032 (Ark. 1915).

The legislature may change or abolish the inchoate right of dower, it being not a vested right. *Skelly Oil Co. v. Murphy*, 180 Ark. 1023, 24 S.W.2d 314 (1930).

Until her husband's death a wife's right of dower is inchoate, that is, it is contingent upon his death during her lifetime. It is not an interest in her husband's property as may be conveyed by her and may only be relinquished by her to her husband's grantee in the manner and form as provided by statute. *Le Croy v. Cook*, 211 Ark. 966, 204 S.W.2d 173, 1 A.L.R.2d 1032 (1947).

A widow's dower is not an estate in itself but, when assigned, it becomes a life estate in the lands assigned, prior to which it has attached to nothing, although it is a right vested in the widow. *Bradham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968).

### **Oil and Gas Interests.**

Where a wife fails to join in deed conveying an interest in oil and gas under certain land, one-third of the proceeds of the oil drawn therefrom is properly impounded to protect her inchoate right of dower. *B.H. & M. Oil Co. v. Graves*, 182 Ark. 659, 32 S.W.2d 630 (1930).

### **Partnership Property.**

A widow is not entitled to dower in partnership property. *Drewry v. Montgomery*, 28 Ark. 256 (1873); *Welch v. McKenzie*, 66 Ark. 251, 50 S.W. 505 (1899).

A widow takes dower in the surplus of partnership real estate, after the payment of partnership debts, as in real estate, for life only, and not absolutely as in person-



alty, unless there is an agreement between the partners for a conversion and sale of the real estate after the partnership affairs are closed, in which event she takes as in personalty. *Lenow v. Fones*, 48 Ark. 557, 4 S.W. 56 (1887).

### **Priority Over Creditors.**

When dower is once fixed, it is paramount to the right of creditors and purchasers, and no act of the husband, without his wife's consent, can divest her of it. *Tate v. Jay*, 31 Ark. 576 (1876).

Trial court's decision reducing a surviving spouses dower interest, received pursuant to the terms of this section and § 28-11-305, for certain claims against the estate under § 28-53-111 was reversed because the claim for a commission was not a debt that the spouse owed to the estate and the claim based on a note was a contingent claim still subject to unasserted defenses available to the spouse. *Stevens v. Heritage Bank*, 104 Ark. App. 56, 289 S.W.3d 147 (2008).

### **Proceeds of Land Sold.**

A widow is not entitled to dower in the proceeds of land sold by an administrator, but in the specific lands. *Tiner v. Christian*, 27 Ark. 306 (1871).

Where testator's property at death consists of household goods and land, his will directs the land to be sold and converted into cash, and widow elects to take against the will and consents to the sale of the land, her dower in the realty is limited to a life interest in the proceeds from the sale of the land. *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963).

### **Redemption of Lands.**

Where lands redeemed with money of insolvent estate are assigned as dower, a widow must pay her part of sum paid to redeem. *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229 (1900).

### **Relinquishment.**

A woman cannot relinquish dower in favor of her husband. *Countz v. Markling*, 30 Ark. 17 (1875); *Pillow v. Wade*, 31 Ark. 678 (1877).

An infant married woman cannot release dower. *Watson v. Billings*, 38 Ark. 278 (1881).

A wife's relinquishment of dower is inoperative when the husband's deed was ineffectual. *Smith v. Howell*, 53 Ark. 279, 13 S.W. 929 (1890).

A mortgage upon a homestead accepted as security for an antecedent debt of the husband in consideration of which the time was extended for a definite period was valid to convey the wife's dower although the wife was induced to execute it by misrepresentations of the officer who took her acknowledgment that the mortgage did not cover the homestead where the mortgagee had no notice thereof. *Hill v. Yarborough*, 62 Ark. 320, 35 S.W. 433 (1896).

Statutory mode of relinquishing is exclusive. *Bowers v. Hutchinson*, 67 Ark. 15, 53 S.W. 399 (1899).

Where a widow, in pursuance of a family agreement, conveys her homestead and dower interests in certain lands of her husband to one of his heirs, she will be held to have abandoned her rights therein. *Felton v. Brown*, 102 Ark. 658, 145 S.W. 552 (1912).

### **Sale Under Execution.**

Sale of husband's land during his lifetime, under execution against him, does not defeat the claim of his widow, within seven years of his death, to her dower interest therein. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

### **Seizen.**

Seizen need not be a legal title as an equitable estate is sufficient. *Kirby v. Vantrece*, 26 Ark. 368 (1870); *Tate v. Jay*, 31 Ark. 576 (1876); *Hewitt v. Cox*, 55 Ark. 225, 15 S.W. 1026 (1891); *Spalding v. Haley*, 101 Ark. 296, 142 S.W. 172 (1911).

Where a husband died intestate and dower was assigned to his widow in certain lands and subsequently upon her remarriage her second husband purchased the reversion in the dower lands and died before the wife, such reversionary interest was not sufficient to give the second husband "seizen" in the land so as to support, after the death of the second husband, the widow's claim to dower in such reversionary interest. *McGuire v. Cook*, 98 Ark. 118, 135 S.W. 840 (1911).

The husband must have been seized in possession during coverture. *McGuire v. Cook*, 98 Ark. 118, 135 S.W. 840 (1911).

A tenant's widow cannot claim any dower interest in the land for the reason her husband had no title and was not seized of an estate of inheritance in the land. *Kilpatrick v. Kilpatrick*, 204 Ark. 452, 162 S.W.2d 897 (1942).

The requirements of seizen are the same under this section as under § 28-11-307. *Pfaff v. Heizman*, 218 Ark. 201, 235 S.W.2d 551, 23 A.L.R.2d 957 (1951).

**Cited:** *United States v. 339.77 Acres of*

*Land*, 240 F. Supp. 545 (W.D. Ark. 1965); *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980); *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981).

### 28-11-302. Lands exchanged — Election.

If a person seized of an estate of inheritance in lands exchanges it for other lands, the surviving spouse shall not have curtesy or dower of both, but shall make an election to curtesy or dower in the lands given or of those taken in exchange. If the election is not evinced by the commencement of proceedings to recover curtesy or dower of the lands given in exchange within one (1) year after the death of the deceased spouse, the surviving spouse shall be deemed to have elected to take the curtesy or dower of the lands received in exchange.

**History.** Rev. Stat., ch. 52, § 3; C. & M. 1981, No. 714, § 26; A.S.A. 1947, § 61-Dig., § 3516; Pope's Dig., § 4400; Acts 209.

### 28-11-303. Mortgaged land.

(a) When a person seized of an estate of inheritance in land shall have executed a mortgage of the estate before marriage, the surviving spouse, nevertheless, shall be entitled to dower or curtesy out of the lands mortgaged as against every person except the mortgagee and those claiming under him or her.

(b)(1) When a person shall purchase lands during coverture and shall mortgage his or her estate in the lands to secure the payment of the purchase money, the surviving spouse shall not be entitled to dower or curtesy out of the lands as against the mortgagee or those claiming under him or her, although he or she shall not have united in the mortgage. However, he or she shall be entitled to dower or curtesy as against all other persons.

(2) When, in such a case, the mortgagee or those claiming under him or her, shall, after the death of the mortgagor, cause the land mortgaged to be sold, either under a power contained in the mortgage or by virtue of the decree of a circuit court and any surplus shall remain after the payment of the moneys due on the mortgage and the costs and charges of sale, then the surviving spouse shall be entitled to the interest or income of one-third ( $\frac{1}{3}$ ) part of the surplus for life, as his or her curtesy or dower.

(c) A surviving spouse shall not be endowed of lands conveyed to the deceased spouse by way of mortgage unless the deceased spouse has acquired an absolute estate therein during the marriage.

**History.** Rev. Stat., ch. 52, §§ 4-7; C. & §§ 4401-4404; Acts 1981, No. 714, §§ 27-M. Dig., §§ 3517-3520; Pope's Dig., 30; A.S.A. 1947, §§ 61-210 — 61-213.



## CASE NOTES

## ANALYSIS

Constitutionality.  
Increase of Indebtedness.  
Waiver of Rights.

**Constitutionality.**

This section, which gave a widow a dower interest in property which was mortgaged by her husband before the mortgage, but did not give this right to the husband, was gender based and served no important governmental function; thus, it was held unconstitutional since it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision prior to 1981 amendment).

**Increase of Indebtedness.**

A widow's rights in land are subject to mortgage existing at the time of her mar-

riage, but an increase of indebtedness secured by the mortgage made after her marriage and in which she did not join would be void as against her. *Harris v. Mosley*, 195 Ark. 62, 111 S.W.2d 563 (1937).

**Waiver of Rights.**

Where a surviving husband waited until real estate was sold and debts paid before asserting his curtesy right therein, he waived his curtesy rights in the real estate, but was still entitled to curtesy in the net proceeds of the sale. *Quick v. Davidson*, 261 Ark. 38, 545 S.W.2d 917 (1977).

**Cited:** *Birnie v. Main*, 29 Ark. 591 (1874); *Bothe v. Gleason*, 126 Ark. 313, 190 S.W. 562 (1916); *Corcorren v. Sharum*, 141 Ark. 572, 217 S.W. 803 (1920); *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980); *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981).

**28-11-304. Sale of timber, oil, gas, or mineral leases.**

(a) If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be entitled, absolutely and in his or her own right, to one-third ( $\frac{1}{3}$ ) of all money received from the sale of timber, oil and gas or other mineral leases, oil and gas or other mineral royalty or mineral sales, and to one-third ( $\frac{1}{3}$ ) of the money derived from any and all royalty run to the credit of the royalty owners from any oil or gas well or to royalty accruing from the production of other mines or minerals in lands in which he or she has a dower, curtesy, or homestead interest, unless the surviving spouse shall have relinquished same in legal form.

(b)(1) All persons, firms, partnerships, or corporations now engaged in the production of oil and gas or other minerals shall immediately withhold payments to the royalty interests until the rights of the surviving spouse are determined, as defined by this section, and shall thereafter pay the surviving spouse separately his or her one-third ( $\frac{1}{3}$ ) part of all royalty accruing to the royalty interest unless he or she shall have relinquished the royalty interest in legal form.

(2) In the sale of timber, the purchaser shall pay one-third ( $\frac{1}{3}$ ) of the purchase price directly to the surviving spouse or his or her agent or attorney at the time of the execution or delivery of the deed.

**History.** Acts 1945, No. 143, §§ 1, 2; 1963, No. 68, § 1; 1981, No. 714, §§ 21, 22; A.S.A. 1947, §§ 61-204, 61-205.



RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Wright, The Arkansas Law of Oil and Gas, 9 U. Ark. Little Rock L.J. 223.

**28-11-305. Personalty.**

If a person dies leaving a surviving spouse and a child or children, the surviving spouse shall be entitled, as part of dower or curtesy in his or her own right, to one-third (1/3) part of the personal estate whereof the deceased spouse died seized or possessed.

**History.** Rev. Stat., ch. 52, § 20; C. & M. Dig., § 3535; Pope's Dig., § 4420; Acts 1981, No. 714, § 19; A.S.A. 1947, § 61-202.

RESEARCH REFERENCES

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Comment, Arkansas Marriage: A Partnership Between a Husband and Wife, or

a Safety Net for Support?, 61 Ark. L. Rev. 735.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.

CASE NOTES

ANALYSIS

- Constitutionality.
- Choses in Action.
- Conflict of Laws.
- Disposal Free of Dower.
- Execution Against Property.
- Gift Causa Mortis.
- Inchoate Right of Dower.
- Land Under Lease.
- Law Governing.
- Prior Liens.
- Right to Dower.
- Sale of Administrator.
- War Risk Insurance.

**Constitutionality.**

This section, which allowed a widow to take dower in bonds, bills, notes, books, accounts, and evidence of debt which her husband owned at the time of his death, but did not contain a similar provision for the husband, was a gender based statute which had no important governmental function and thus violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision

prior to 1981 amendment). But see *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983).

The statement, in *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), that § 28-11-301 was unconstitutional was too broad and extended beyond the holding reached in *Stokes*, supra, which was that where a husband died testate the wife could not take dower against the will, there being no concomitant benefit given to husbands under the law; the statement should have been qualified by the provisional wording that the statute was unconstitutional "as applied in this case." *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1983) (decision prior to 1981 amendment).

**Choses in Action.**

Prior to enactment of § 28-11-306, it was held that a widow was not entitled to dower in the choses in action of her deceased husband. *Hill's Adm'rs v. Mitchell*, 5 Ark. (5 Pike) 608 (1844); *Mulhollan v. Thompson*, 13 Ark. 232 (1853).

**Conflict of Laws.**

A widow entitled to dower in the equity of redemption of pledged chattels and

dower in chattels is governed by the law of the husband's domicile, irrespective of the situs of the chattel. *Gibson v. Dowell*, 42 Ark. 164 (1883).

### **Disposal Free of Dower.**

A husband can dispose of personalty free of the wife's dower by sale or mortgage. *Street v. Saunders*, 27 Ark. 554 (1872); *McClure v. Owens*, 32 Ark. 443 (1877).

### **Execution Against Property.**

The placing of an execution in the hands of the sheriff in the lifetime of a husband does not cut off the widow's right of dower in his goods, unless the officer proceeds to make a levy before his death. *James v. Marcus*, 18 Ark. 421 (1857).

### **Gift Causa Mortis.**

A widow is entitled to dower in a gift causa mortis. *Hatcher v. Buford*, 60 Ark. 169, 29 S.W. 641 (1895).

### **Inchoate Right of Dower.**

A widow's right of dower remains only an inchoate right and is not an estate until the husband's death, the right of dower being only a contingent expectancy during the lifetime of the husband. *Mickle v. Mickle*, 253 Ark. 663, 488 S.W.2d 45 (1972).

### **Land Under Lease.**

Where land under lease is in tenant's possession at time of landlord's death, such possession is the possession of the landlord and the interest of the widow of the landlord is governed by the rules of dower in real property and not those relating to personalty. *Brack v. Coburn*, 210 Ark. 334, 196 S.W.2d 230 (1946).

### **Law Governing.**

The legislature may increase or diminish dower in personal property. *Wooton v. Keaton*, 168 Ark. 981, 272 S.W. 869 (1925).

The law governing the widow's right of dower is the one existing at the time of the death of the husband and not that existing at the time of the marriage. *Sanders v. Taylor*, 193 Ark. 1095, 104 S.W.2d 797 (1937).

### **Prior Liens.**

Dower in personalty is reduced by liens created prior to a husband's death. *Thompson v. Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S.W. 324 (1924),

superseded by statute as stated in, *Terral v. Terral*, 212 Ark. 221, 205 S.W.2d 198 (1947).

### **Right to Dower.**

A widow is entitled to one-third out of each kind or class of personal property of which her husband dies possessed. *Ex parte Grooms*, 102 Ark. 322, 143 S.W. 1063 (1912); *Sharp v. Himes*, 129 Ark. 327, 196 S.W. 131 (1917); *Beal-Burrow Dry Goods Co. v. Kessinger*, 132 Ark. 132, 200 S.W. 1002 (1918).

Under this section, a widow is entitled, absolutely and in her own right, to one-third of the personal property of all kinds which her husband owned at his death, without deduction for any debts or claims or expense of administration. *Dolton v. Allen*, 205 Ark. 189, 167 S.W.2d 893 (1943).

Both the widow and heirs at law are distributees of a solvent intestate estate under §§ 28-1-102 and 28-53-113, and therefore secured debts are to be discharged out of the general estate, unpledged personal property, where the creditor does not pursue the security, which gives the widow a dower right in the entire security free from the debt. *Wilcox v. Brewer*, 224 Ark. 546, 274 S.W.2d 777 (1955).

Where a widow elects to take a dower interest against the will and consents to the conversion of the realty owned by testator at death into cash, as provided by the will, she may not, as the result of the conversion, thereby maintain a claim to an absolute one-third of the gross estate. *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963).

Where decedent left surviving children, the estate possessed no general assets, and the property was security for a debt incurred prior to decedent's death, the probate judge did not err in awarding the wife dower limited to the net value of the account that constituted the estate. *Balfanz v. Estate of Balfanz*, 31 Ark. App. 71, 787 S.W.2d 699 (1990).

Trial court's decision reducing a surviving spouse's dower interest, received pursuant to the terms of § 28-11-301 and this section, for certain claims against the estate under § 28-53-111 was reversed because the claim for a commission was not a debt that the spouse owed to the estate and the claim based on a note was a



contingent claim still subject to unas-  
serted defenses available to the spouse.  
*Stevens v. Heritage Bank*, 104 Ark. App.  
56, 289 S.W.3d 147 (2008).

#### **Sale of Administrator.**

A widow is entitled to one-third of the personal estate absolutely, and an administrator holds it as a trustee for her; if he sells it, she is entitled to the proceeds of one-third of the sale. *Meniffee's Adm'r's v. Meniffee*, 8 Ark. (3 English) 9 (1847).

When an administrator applies the personal property to pay off debts of the estate, which property the widow had her right of dower in, she may be subrogated to the remedies of the creditors of the real estate. *Crouch v. Edwards*, 52 Ark. 499, 12 S.W. 1070 (1889).

Where a widow sits by and tacitly lets her one-third interest in her husband's personal property be liquidated into cash by administrator, she is liable for one-

third of the reasonable and fair cost of doing this work. *Dolton v. Allen*, 205 Ark. 189, 167 S.W.2d 893 (1943).

#### **War Risk Insurance.**

Where a husband died leaving a policy of war risk insurance, one-fourth of which was payable to his mother in instalments as long as she lived and at her death the balance, if any, was to go to his estate, it was held that, on the mother's death, the value of the unpaid instalment which would have been paid to her if she had lived and which reverted to his estate was such an estate as entitled the widow of the insured to a dower interest therein. *Childers v. Pollock*, 178 Ark. 1031, 13 S.W.2d 8 (1929).

**Cited:** *United States v. Norman*, 184 F. Supp. 309 (W.D. Ark. 1960); *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980); *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981).

### **28-11-306. Bonds, notes, accounts, and evidences of debt.**

If any person shall die leaving a surviving spouse, the surviving spouse shall be allowed to take the same dower or curtesy in the bonds, bills, notes, books, accounts, and evidences of debt as the surviving spouse would be entitled to take out of the personal property or cash on hand of the deceased spouse.

**History.** Acts 1859, No. 231, § 1, p. 299; 1867, No. 116, § 1, p. 277; C. & M. Dig., § 3535; Pope's Dig., § 4420; Acts

1981, No. 714, § 20; A.S.A. 1947, § 61-203.

### **CASE NOTES**

#### **ANALYSIS**

Constitutionality.  
Priority of Dower.  
United States Bonds.

#### **Constitutionality.**

This section, which allowed a widow to take dower in bonds, bills, notes, books, accounts, and evidence of debt which her husband owned at the time of his death, but did not contain a similar provision for the husband, was a gender based statute which had no important governmental function and thus violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d

372, 18 A.L.R.4th 903 (1981) (decision under prior law).

#### **Priority of Dower.**

This section, as amended in 1867, makes the right of dower in deceased husband's choses in action superior to the claims of creditors. *Crowley v. Mellon*, 52 Ark. 1, 11 S.W. 876 (1889).

#### **United States Bonds.**

A widow who renounced the will had no dower rights in United States "H" bonds purchased by her deceased husband, payable on death to his son and daughter, as the bonds belonged to the named payees and did not become a part of the estate of the deceased. *Harrison v. Harrison*, 234 Ark. 271, 351 S.W.2d 441 (1961).



**Cited:** United States v. Norman, 184 F. (1980); Hess v. Wims, 272 Ark. 43, 613 Supp. 309 (W.D. Ark. 1960); Owen v. S.W.2d 85 (1981).  
Owen, 267 Ark. 532, 592 S.W.2d 120

**28-11-307. Dower or curtesy when no children.**

(a)(1) If a person dies leaving a surviving spouse and no children, the surviving spouse shall be endowed in fee simple of one-half (½) of the real estate of which the deceased person died seized when the estate is a new acquisition and not an ancestral estate and of one-half (½) of the personal estate, absolutely, and in his or her own right, as against collateral heirs.

(2) However, as against creditors, the surviving spouse shall be invested with one-third (⅓) of the real estate in fee simple if a new acquisition, and not ancestral, and of one-third (⅓) of the personal property absolutely.

(b) If the real estate of the deceased person is an ancestral estate, the surviving spouse shall be endowed in a life estate of one-half (½) of the estate as against collateral heirs and one-third (⅓) as against creditors.

**History.** Rev. Stat., ch. 52, § 21; Acts Pope's Dig., § 4421; Acts 1981, No. 714, 1891, No. 65, § 1; C. & M. Dig., § 3536; § 23; A.S.A. 1947, § 61-206.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Domestic Relations — Adoption of Adults, 12 Ark. L. Rev. 199.  
Comment, Arkansas Marriage: A Partnership Between a Husband and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.

**CASE NOTES**

**ANALYSIS**

Constitutionality.  
Construction.  
Adopted Children.  
Descent to Heirs.  
Effect of Amendment.  
Effect of Debts.  
Equitable Title.  
Inheritance Tax.  
Interest of Other Heirs.  
Judicial Sale.  
Leases.  
Mistake in Assignment.  
New Acquisition.  
Pending Divorce Suit.  
Priority of Dower.  
Seizen.  
Separation Agreement.  
Vesting of Interest.

**Constitutionality.**

The operation of the dower provisions under this section, § 28-11-201, and § 28-11-301 which gave a wife the right of dower which could not be defeated by a husband's conveyance and the comparable curtesy statutes under former §§ 61-228 (repealed) and 61-229 (repealed), which allow a wife to defeat curtesy by conveyance, provided for dissimilar treatment for men and women similarly situated, and since there was no justification for the discrimination, this section and § 28-11-201 were held unconstitutional. Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981) (decision under prior law).

**Construction.**

This section means that if a husband dies leaving a widow and no direct descen-

dants, the widow will be endowed as provided. *Britton v. Oldham*, 80 Ark. 252, 96 S.W. 1066 (1906).

The word "children" as used in this section includes all direct descendants. *Starrett v. McKim*, 90 Ark. 520, 119 S.W. 824 (1909).

Dower in real estate "of which such husband died seized" includes lands sold in lifetime of the husband without wife's consent. *Fletcher v. Felker*, 97 F. Supp. 755 (W.D. Ark. 1951) (decision prior to 1981 amendment).

### **Adopted Children.**

A widow is not entitled to dower under this section where there are surviving adopted children. *Sanders v. Taylor*, 193 Ark. 1095, 104 S.W.2d 797 (1937).

### **Descent to Heirs.**

Where a widow has, under this section, become entitled to one-half of the realty of which her husband died seized, and dies herself, her heirs and his heirs become tenants in common and hold the land as such. *Avera v. Banks*, 168 Ark. 718, 271 S.W. 970 (1925).

### **Effect of Amendment.**

The act of 1891 amending this section did not amend, repeal, or in any manner impair § 28-11-201 or 28-11-301. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

### **Effect of Debts.**

A widow is entitled to one-half the estate as against collateral heirs even though all the remainder of the estate is needed to pay debts, and if more than half the estate is needed to pay debts, the widow, as against the collateral heirs, is entitled to the remainder. *Whitener v. Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957).

### **Equitable Title.**

A wife does not have dower interest in land to which her husband has equitable title if he transfers the land prior to his death. *Fletcher v. Felker*, 97 F. Supp. 755 (W.D. Ark. 1951).

Where husband entered into a contract to sell land to which he held the equitable title, and thereafter pursuant to the agreement the parties holding the legal title transferred the land to husband, wife did not hold dower in the land, since the husband acquired no beneficial interest in the land as it was subject to a contract to

convey. *Fletcher v. Felker*, 97 F. Supp. 755 (W.D. Ark. 1951).

### **Inheritance Tax.**

Endowment is not subject to the inheritance tax law. *McDaniel v. Byrkett*, 120 Ark. 295, 179 S.W. 491 (1915).

### **Interest of Other Heirs.**

The widow of one who died childless holding part of the fee simple title to land by inheritance and part by deed from one of his co-heirs held the land partly as unassigned dower and partly as tenant in common with the other heirs, and her holding possession of the land and paying the taxes on it could not be adverse to the interests of the other heirs or their grantees. *Head v. Farnum*, 244 Ark. 367, 425 S.W.2d 303 (1968).

### **Judicial Sale.**

The sale of a husband's land during his lifetime under execution against him does not defeat the claim of his widow, within seven years of his death, to her dower interest therein. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

Where husband's land was sold under execution against him and there were no children or creditors, the widow was entitled to be endowed in fee simple of one-half of the realty sold at the execution sale. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

### **Leases.**

The interest of a widow in leases on her husband's real estate is an estate in land and not a chattel interest. *Brack v. Coburn*, 210 Ark. 334, 196 S.W.2d 230 (1946).

### **Mistake in Assignment.**

Equity will decree a reformation for mistake in settlement between parties who were ignorant of provisions of this section. *Terry v. Logue*, 75 Ark. 240, 87 S.W. 119 (1905).

Where a probate court, acting on the theory that there are no debts, assigns one-half of the homestead of a decedent to his widow in fee and the other half as dower, and subsequently creditors appear, she will, in the absence of a showing in the record to the contrary, be held not to have waived her homestead rights. *Robertson v. Adams*, 163 Ark. 290, 260 S.W. 37 (1924).

Where commissioners had recommended, without explanation, that ancestral estates be assigned to the wife in fee,



the confirmation by the court could be set aside at instance of collateral heirs. *Browning v. Berg*, 196 Ark. 595, 118 S.W.2d 1017 (1938).

### **New Acquisition.**

Where a father, in consideration of the assumption by his son of a portion of a mortgage, conveyed certain lands to his son, the grant became, in the son, a new acquisition, and there being no children, his widow's dower was in fee. *Beard v. Beard*, 148 Ark. 29, 228 S.W. 734 (1921).

The widow of a deceased husband takes one-half of his lands which are new acquisitions in fee simple. *Wilson v. Biles*, 171 Ark. 912, 287 S.W. 373 (1926).

Where a husband dies childless, his widow's dower in a new acquisition is one-half thereof which passes to her, while the other one-half passes to his collateral heirs subject to her right of homestead. *Smith v. Goldby*, 172 Ark. 549, 289 S.W. 780 (1927).

Where a married son dies leaving lands as a new acquisition and no children or creditors, his father and his widow each takes a half interest therein in fee. *Tandy v. Smith*, 173 Ark. 828, 293 S.W. 735 (1927).

### **Pending Divorce Suit.**

A testator's widow not divorced, though a suit for that purpose was pending, is entitled to one-half of his personal estate, there being no children, and a specific legacy of money in a bank is to be included in arriving at her share. *Holcomb v. Mulin*, 167 Ark. 622, 268 S.W. 32 (1925).

### **Priority of Dower.**

Although a bankruptcy debtor's recognizable, inchoate dower interest in her husband's real property was property of the debtor's bankruptcy estate, the property was not subject to turnover under 11 U.S.C.S. § 542 due to the debtor's legal inability to transfer the interest to anyone other than the husband's grantee. In re *Flippin*, 334 B.R. 434 (Bankr. W.D. Ark. 2005), modified, *Clark v. Flippin*, — F. Supp.2d —, 2006 U.S. Dist. LEXIS 71739 (W.D. Ark. Sept. 29, 2006).

Bankruptcy court correctly held that, although a debtor's dower interest was property of the bankruptcy estate, it could not be conveyed and, because the interest was not one which was transferable, it was not subject to turnover under 11

U.S.C.S. § 542(a). *Clark v. Flippin*, — F. Supp.2d —, 2006 U.S. Dist. LEXIS 71739 (W.D. Ark. Sept. 29, 2006).

### **Seizen.**

There must have been actual corporeal seizen in the husband during coverture; therefore, dower will not attach to realty in which he had only a remainder or reversion. *McGuire v. Cook*, 98 Ark. 118, 135 S.W. 840 (1911).

A widow has an interest in real estate of which her husband died seized, which, so far as the wife's dower is concerned, includes lands sold in the lifetime of the husband without her consent in legal form against all creditors of the estate. *Roetzel v. Beal*, 196 Ark. 5, 116 S.W.2d 591 (1938).

Possession by tenant of leased land is possession of landlord. *Brack v. Coburn*, 210 Ark. 334, 196 S.W.2d 230 (1946).

If father dies leaving a widow, a married son, and three other children, and children do not live on the land after the death of the father, and married son dies before his mother, leaving a widow, the widow of married son is not entitled to dower, as her husband did not die seized of an estate of inheritance. *Maloney v. McCullough*, 215 Ark. 570, 221 S.W.2d 770 (1949).

### **Separation Agreement.**

Where a husband dies leaving lands, not ancestral, and there are neither debts nor children, his widow is entitled to one-half thereof in fee simple, though there was a separation agreement between them which, however, had been annulled by their subsequently living together as husband and wife. *Sherman v. Sherman*, 159 Ark. 364, 252 S.W. 27 (1923).

### **Vesting of Interest.**

The widow's interest vests in her immediately on the husband's death and will descend to her heirs. *Barton v. Wilson*, 116 Ark. 400, 172 S.W. 1032 (Ark. 1915).

No adjudication of a court is necessary. *Kendall v. Crenshaw*, 116 Ark. 427, 173 S.W. 393 (1915).

The estate becomes vested immediately upon a husband's death, but it does not vest in severalty until it is assigned to the widow. *Arbaugh v. West*, 127 Ark. 98, 192 S.W. 171 (1917).

Dower interest of a widow vests immediately upon death of her husband, but dower interest does not vest if husband



does not die seized of property. *Maloney v. McCullough*, 215 Ark. 570, 221 S.W.2d 770 (1949).

Where a father died intestate and his son was appointed administrator but died intestate and without surviving issue before expiration of time for filing claims against father's estate and without ever having taken charge of the real estate of the father's estate, and the debts of the father's estate were all paid from the personalty, the widow of the son was entitled to dower in her husband's interest in the lands of his father, under provisions

of this section, since her husband died seized of the lands. *Pfaff v. Heizman*, 218 Ark. 201, 235 S.W.2d 551, 23 A.L.R.2d 957 (1951).

**Cited:** *Thomas v. Langley*, 200 Ark. 220, 138 S.W.2d 380 (1940); *Howze v. Hutchens*, 213 Ark. 52, 209 S.W.2d 286 (1948); *Daniels v. Johnson*, 216 Ark. 374, 226 S.W.2d 571, 15 A.L.R.2d 1401 (1950); *Harbour v. Sheffield*, 269 Ark. 932, 601 S.W.2d 595 (Ct. App. 1980); *Heath v. Clear*, 280 Ark. 482, 659 S.W.2d 504 (1983).

## SUBCHAPTER 4 — PROVISIONS IN LIEU OF DOWER OR CURTESY

### SECTION.

28-11-401. Jointure or payment with spouse's assent.

28-11-402. Jointure or payment — Election of spouse.

28-11-403. Devise or bequest — Election of spouse.

### SECTION.

28-11-404. Devise deemed in lieu of dower or curtesy.

28-11-405. Forfeiture.

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**Effective Dates.** Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing

law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

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### 28-11-401. Jointure or payment with spouse's assent.

(a) When an estate in land shall be conveyed to a person and his or her intended spouse, or to the intended spouse alone, or to any person in trust for the person and his or her intended spouse, or in trust for the spouse alone, for the purpose of erecting a jointure for the intended spouse, and with his or her assent, the jointure shall be a bar to any right or claim for dower or curtesy of the spouse in any land of the other spouse.

(b) The assent of the spouse to the jointure shall be evinced, if he or she is of full age, by his or her becoming a party to the conveyance by which it shall be settled or, if the spouse is an infant, by his or her joining with his or her father or guardian in the conveyance.

(c) Any pecuniary provision that shall be made for the benefit of an intended spouse, and in lieu of dower or curtesy, if assented to by the intended spouse, as provided in this section, shall be a bar to any right or claim of dower or curtesy of the spouse in all lands of his or her spouse.

**History.** Rev. Stat., ch. 52, §§ 9-11; C. §§ 4406-4408; Acts 1981, No. 714, §§ 31-33; A.S.A. 1947, §§ 61-214 — 61-216.

## CASE NOTES

### ANALYSIS

Equitable Jointure.

Right to Possession.

Separation Agreement.

### Equitable Jointure.

An antenuptial agreement between husband and wife that the wife shall take a child's part in her husband's estate, except as to the homestead, being intended in lieu of dower, though not a technical jointure, will be deemed an equitable jointure. *Comstock v. Comstock*, 146 Ark. 266, 225 S.W. 621 (1920).

### Right to Possession.

Jointure bars dower, and the right to possession of a jointure accrues upon the husband's death. *Bryan v. Bryan*, 62 Ark. 79, 34 S.W. 260 (1896).

### Separation Agreement.

A wife cannot claim dower in her deceased husband's lands where she agreed to a separation from him and accepted a deed to certain lands in lieu of dower. *McGaugh v. Mathis*, 131 Ark. 221, 198 S.W. 1147 (1917).

## 28-11-402. Jointure or payment — Election of spouse.

If, before the marriage, but without a spouse's assent, or if, after the marriage, land shall be given or assured for the jointure of a spouse or a pecuniary provision shall be made for the spouse in lieu of dower or curtesy, the spouse shall make an election whether the spouse will take the jointure or pecuniary provision, or whether the spouse will be endowed of the lands of the other spouse. However, the spouse shall not be entitled to both.

**History.** Rev. Stat., ch. 52, § 12; C. & 1981, No. 714, § 34; A.S.A. 1947, § 61-M. Dig., § 3525; Pope's Dig., § 4409; Acts 217.

## 28-11-403. Devise or bequest — Election of spouse.

If land is devised to a spouse, or a pecuniary or other provision is made for a spouse by will in lieu of dower or curtesy, the spouse shall make an election whether he or she will take the land so devised, or the provision so made, or whether he or she will be endowed of the lands of the other spouse.

**History.** Rev. Stat., ch. 52, § 13; C. & 1981, No. 714, § 35; A.S.A. 1947, § 61-M. Dig., § 3526; Pope's Dig., § 4410; Acts 218.



## RESEARCH REFERENCES

**Ark. L. Rev.** The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, IV. A Major Defect

Marked for Correction, 23 Ark. L. Rev. 313.

## CASE NOTES

## ANALYSIS

Construction of Will.

Election.

Land Taking the Form of Personalty.

Personalty.

Statutory Allowances.

**Construction of Will.**

A will providing for maintenance of the testator's widow from the income of the estate and directing the trustee to hold the entire real estate intact until the widow's death, unless its use was necessary for her care and maintenance, was held to make provision in lieu of dower, requiring an election on her part. *United States Fid. & Guar. Co. v. Edmondson*, 187 Ark. 257, 59 S.W.2d 488 (1933).

**Election.**

Acceptance of bequest in lieu of dower will be presumed to be an election to take under the will. *Goodrum v. Goodrum*, 56 Ark. 532, 20 S.W. 353 (1892).

Where a widow made no election to disregard the will, she is presumed to take under the will, though she would have profited by renouncing the will. *Kirk v. Mason*, 188 Ark. 1000, 68 S.W.2d 1012 (1934).

In an administrator's suit to enforce payment of a note executed by a widow for the purchase of the deceased husband's partnership interests, where she had joined in a petition by the administrator to the probate court to approve the sale of the deceased husband's partnership interest to her and expressly waived her right to dower in her husband's estate with full knowledge of her rights, she will be held to

have made a binding election to take under the deceased husband's will and hence not be entitled to claim dower in his estate. *McEachin v. People's Nat'l Bank*, 191 Ark. 544, 87 S.W.2d 12 (1935).

If the owner of real property dies intestate, the title to his property vests immediately in his heirs subject to appropriate provisions for administration under the Probate Code and subject to widow's dower and homestead rights, if any. *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970).

**Land Taking the Form of Personalty.**

Where testator's property at death consists of household goods and land, his will directs the land to be sold and converted into cash, and the widow elects to take against the will and consents to the sale of the land, her dower in the realty is limited to a life interest in the proceeds from the sale of the land. *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963).

**Personalty.**

This section does not apply to a devise of personalty. *Kollar v. Noble*, 184 Ark. 297, 42 S.W.2d 408 (1931).

**Statutory Allowances.**

The widow was not required to elect between taking under the will and taking the statutory allowances; as allowances are no part of dower and may be claimed without disavowing the will, unless clearly against the provisions of the will. *Costen v. Fricke*, 169 Ark. 572, 276 S.W. 579 (1925).

**Cited:** *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970).

**28-11-404. Devise deemed in lieu of dower or curtesy.**

If any spouse shall devise and bequeath to the other spouse any portion of his or her real estate of which he or she died seized, it shall be deemed and taken in lieu of dower or curtesy, as the case may be, out of the estate of the deceased spouse, unless the testator shall, in his or her will, declare otherwise.



**History.** Rev. Stat., ch. 52, § 23; C. & 1981, No. 714, § 37; A.S.A. 1947, § 61-M. Dig., § 3538; Pope's Dig., § 4424; Acts 221.

CASE NOTES

**Personalty.**

This section does not apply to a devise of personality. *Kollar v. Noble*, 184 Ark. 297, 42 S.W.2d 408 (1931).

**28-11-405. Forfeiture.**

Every jointure, devise, and pecuniary provision, in lieu of dower or curtesy, shall be forfeited by the spouse for whose benefit it shall be made, in the same cases in which the spouse would forfeit his or her dower or curtesy, as the case may be. Upon such a forfeiture, any estate so conveyed for jointure and every pecuniary provision so made shall immediately vest in the person, or his or her legal representatives, in whom they would have vested on the determination of the spouse's interest therein by the death of the spouse.

**History.** Rev. Stat., ch. 52, § 15; C. & 1981, No. 714, § 36; A.S.A. 1947, § 61-M. Dig., § 3528; Pope's Dig., § 4412; Acts 220.

CASE NOTES

**Cited:** *Pickens v. Black*, 318 Ark. 474, 885 S.W.2d 872 (1994).

CHAPTER 12

DISPOSITION OF COMMUNITY PROPERTY

SECTION.

- 28-12-101. Application.
- 28-12-102. Rebuttable presumptions.
- 28-12-103. Disposition upon death.
- 28-12-104. Perfection of title of surviving spouse.
- 28-12-105. Perfection of title of personal representative, heir, or devisee.
- 28-12-106. Purchaser for value or lender.

SECTION.

- 28-12-107. Creditor's rights.
- 28-12-108. Acts of married persons.
- 28-12-109. Limitations on testamentary disposition.
- 28-12-110. Uniformity of application and construction.
- 28-12-111. Short title.
- 28-12-112. Effective date.
- 28-12-113. Repealer.

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**Publisher's Notes.** For Comments regarding the Uniform Disposition of Community Property Rights at Death Act, see Commentaries Volume B.

RESEARCH REFERENCES

**Am. Jur.** 15A **Am. Jur.** 2d, Community Prop., § 109 et seq.      **Ark. L. Notes.** Watkins, A Guide to Choice of Law in Arkansas, 2005 Arkan-

sas L. Notes 151.

**Ark. L. Rev.** Leflar, Conflict of Laws: Arkansas, 1983-87, 41 Ark. L. Rev. 63.

**U. Ark. Little Rock L.J.** Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.

### 28-12-101. Application.

This chapter applies to the disposition at death of the following property acquired by a married person:

(1) All personal property, wherever situated:

(i) Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or

(ii) All or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or

(iii) Traceable to that community property;

(2) All or the proportionate part of any real property situated in this state which was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

**History.** Acts 1981, No. 660, § 1; A.S.A. 1947, § 61-401.

### RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

### 28-12-102. Rebuttable presumptions.

In determining whether this chapter applies to specific property, the following rebuttable presumptions apply:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this chapter applies; and

(2) Real property situated in this state and personal property wherever situated acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this chapter applies.

**History.** Acts 1981, No. 660, § 2; A.S.A. 1947, § 61-402.

**28-12-103. Disposition upon death.**

Upon the death of a married person, one-half ( $\frac{1}{2}$ ) of the property to which this chapter applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this state. One-half ( $\frac{1}{2}$ ) of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this state. With respect to property to which this chapter applies, the one-half ( $\frac{1}{2}$ ) of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will and no estate of dower or curtesy exists in the property of the decedent.

**History.** Acts 1981, No. 660, § 3; A.S.A. 1947, § 61-403.

**28-12-104. Perfection of title of surviving spouse.**

If the title to any property to which this chapter applies was held by the decedent at the time of death, title of the surviving spouse may be perfected by an order of the court or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the court. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this chapter applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

**History.** Acts 1981, No. 660, § 4; A.S.A. 1947, § 61-404.

**28-12-105. Perfection of title of personal representative, heir, or devisee.**

If the title to any property to which this chapter applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this chapter applies, unless a written demand is made by an heir, devisee, or creditor of the decedent.

**History.** Acts 1981, No. 660, § 5; A.S.A. 1947, § 61-405.

**28-12-106. Purchaser for value or lender.**

(a) If a surviving spouse has apparent title to property to which this chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any



rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender.

**History.** Acts 1981, No. 660, § 6; A.S.A. 1947, § 61-406.

### **28-12-107. Creditor's rights.**

This chapter does not affect rights of creditors with respect to property to which this chapter applies.

**History.** Acts 1981, No. 660, § 7; A.S.A. 1947, § 61-407.

### **28-12-108. Acts of married persons.**

This chapter does not prevent married persons from severing or altering their interests in property to which this chapter applies.

**History.** Acts 1981, No. 660, § 8; A.S.A. 1947, § 61-408.

### **28-12-109. Limitations on testamentary disposition.**

This chapter does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person.

**History.** Acts 1981, No. 660, § 9; A.S.A. 1947, § 61-409.

### **28-12-110. Uniformity of application and construction.**

This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states which enact it.

**History.** Acts 1981, No. 660, § 10; A.S.A. 1947, § 61-410.

**28-12-111. Short title.**

This chapter may be cited as the “Uniform Disposition of Community Property Rights at Death Act.”

**History.** Acts 1981, No. 660, § 11;  
A.S.A. 1947, § 61-411.

**28-12-112. Effective date.**

This chapter shall become effective on October 1, 1981.

**History.** Acts 1981, No. 660, § 17[12];  
A.S.A. 1947, § 61-114n.

**28-12-113. Repealer.**

All laws and parts of laws in conflict with this chapter are repealed.

**History.** Acts 1981, No. 660, § 13.

## CHAPTER 13

### ESCHEATED ESTATES

SECTION.

- 28-13-101. Applicability of chapter.
- 28-13-102. Prerequisites to escheat of property.
- 28-13-103. Claims for nursing care of intestate.
- 28-13-104. Settlement of administrator's accounts.
- 28-13-105. Prosecuting attorney — Duties.
- 28-13-106. Escheat of real property — Proceedings.

SECTION.

- 28-13-107. Escheat of real property — Judgments.
- 28-13-108. Escheat of real property — Vesting title in county.
- 28-13-109. Sale of escheated real estate.
- 28-13-110. Reclamation of escheated property.
- 28-13-111. Review of proceedings.
- 28-13-112. County treasurer's duties.

**Publisher's Notes.** Prior to the amendment of Rev. Stat., ch. 57, by Acts 1985, No. 703, which became effective on March 28, 1985, property which qualified for escheatment escheated to and vested in the state.

**Cross References.** Publication of notice, § 16-3-101 et seq.

Transfer of civil duties of prosecuting attorney to county attorney, § 16-21-114.

**Preambles.** Acts 1979, No. 899, contained a preamble which read: “Whereas, Arkansas Social Services now provides funds to pay for nursing care for many indigent persons who have no heirs; and

“Whereas, Arkansas Social Services provides a monthly sum to indigent patients to purchase personal supplies; and

“Whereas, the funds provided are often not used and result in a small estate normally being kept for the individual under nursing home accounting procedures; and

“Whereas, a procedure for these funds to escheat to the state is long and expensive; and

“Whereas, the moneys have originally come from Arkansas Social Services and should be returned to Arkansas Social Services;

"Now therefore...."

**Effective Dates.** Acts 1885, No. 18, § 5: effective on passage.

Acts 1985, No. 703, § 8: Mar. 28, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law provides for escheated estates to become the property of the State; that due to the financial hardships facing counties it now appears more

equitable to allow estates to escheat to the county wherein the decedent resided at death; that such property will continue to escheat to the State until this Act goes into effect. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

### RESEARCH REFERENCES

**Am. Jur.** 27A Am. Jur. 2d, Escheat, § 1 et seq.

**Ark. L. Rev.** Abandoned Property, Ark. L. Rev. 339.

**C.J.S.** 30A C.J.S., Escheat, § 1 et seq.

**U. Ark. Little Rock L.J.** Legislative Survey, Probate, 8 U. Ark. Little Rock L.J. 597.

Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

### CASE NOTES

#### Time of Escheat.

Escheat occurs immediately upon the death of the intestate, not when the probate court enters its order finding the

estate must escheat. *Newton County v. West*, 293 Ark. 461, 739 S.W.2d 141 (1987).

## 28-13-101. Applicability of chapter.

The provisions of this chapter shall apply to all estates which have not escheated to the state prior to March 28, 1985.

**History.** Acts 1985, No. 703, § 6; A.S.A. 1947, § 62-1833.

### CASE NOTES

**Cited:** *Newton County v. West*, 293 Ark. 461, 739 S.W.2d 141 (1987).

## 28-13-102. Prerequisites to escheat of property.

If any person dies seized of any real or personal estate, without any devise thereof, and leaving no heirs or representatives capable of inheriting the estate, or the devisees are incapable of holding the estate, and when there is no owner of real estate capable of holding the estate, the estate shall escheat to and vest in the county wherein the decedent resided at death.

**History.** Rev. Stat., ch. 57, § 1; C. & M. 1985, No. 703, § 2; A.S.A. 1947, § 62-Dig., § 4078; Pope's Dig., § 5087; Acts 1801.



## CASE NOTES

**Cited:** State ex rel. Going v. Southwestern Land & Timber Co., 93 Ark. 621, 126 S.W. 73 (1910); King v. Harris, 134 Ark. 337, 203 S.W. 847 (1918); State v. Phillips Petroleum Co., 212 Ark. 530, 206 S.W.2d 771 (1947); Newton County v. West, 293 Ark. 461, 739 S.W.2d 141 (1987).

**28-13-103. Claims for nursing care of intestate.**

(a) If any person dies seized of any real or personal estate, with no surviving spouse or minor children and the person has received nursing care paid in whole or in part by the Department of Human Services, then the department shall be entitled to reimbursement for the total amount of nursing care paid for by the department for the intestate.

(b) The department may file as a distributee under the provisions of § 28-41-101 for the sum total of all nursing home payments made by the state on behalf of the intestate decedent when:

(1) The department is informed or has reason to believe that there are no known heirs or legal representatives of the intestate, or that no person will appear within one (1) year after granting letters of administration; or

(2) There has been no pleading filed to dispense with administration under § 28-41-101 to claim the personal estate of the intestate as next of kin.

(c) In the event that the property remaining exceeds the amount of payment made by the department on behalf of the decedent, the excess funds shall escheat to the state under the procedures of this chapter.

**History.** Acts 1979, No. 899, §§ 1-3; A.S.A. 1947, §§ 62-2615 — 62-2617; Acts 2001, No. 927, § 1. **Cross References.** Intestate succession, § 28-9-201 et seq.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of Legislation, 2001 Arkansas General Assembly, Probate Law, 24 U. Ark. Little Rock L. Rev. 631.

**28-13-104. Settlement of administrator's accounts.**

(a) When there is administration granted and there are no known heirs or legal representatives of the intestate, or no person shall appear, within two (2) years after granting letters of administration, to claim the personal estate of the intestate, as next of kin, the administrator, in the settlement of his or her accounts with the proper court, shall account for all money which may come to his or her hands as administrator.

(b) If there is an amount more than sufficient to pay the debts of the deceased and the expenses of the administration, the court, on settlement, shall ascertain the amount remaining in the hands of the administrator and grant duplicate certificates thereof, one (1) of which

shall be delivered to the prosecuting attorney and the other to the county treasurer, who shall charge the administrator with the amount.

(c) The administrator shall pay the amount into the county treasury within three (3) months after the settlements. When the administrator pays the amount, the county treasurer shall give him or her a receipt therefor and credit him or her with the amount so paid into the treasury.

(d) The court having the settlement of accounts with the administrator, upon the production of the county treasurer's certificate to them, shall credit the administrator with the amount.

(e) However, if payment shall not be made, the prosecuting attorney for the district shall move the court for judgment against the administrator and his or her securities, or either of them, for such balance and three percent (3%) per month thereon, giving to the administrator and his or her securities ten days' notice of the intended motion. The court shall hear and determine the motion in a summary manner, without the necessity of formal pleading.

(f) If the administrator or his or her securities do not produce the county treasurer's certificate showing full payment into the county treasury, the court shall render judgment against the administrator and his or her securities, or such of them as shall receive notice, for the amount due, and three percent (3%) per month thereon from the time the balance was first ascertained until the rendition of the judgment, and the costs of the proceedings, and issue execution thereon.

(g) If the certificate of the Auditor of State is produced, the administrator and his or her securities shall, nevertheless, be adjudged to pay the costs of the proceedings and shall in no case recover costs.

**History.** Rev. Stat., ch. 57, §§ 2-7; C. & §§ 5088-5093; Acts 1985, No. 703, § 3; M. Dig., §§ 4079-4084; Pope's Dig., A.S.A. 1947, §§ 62-1802 — 62-1807.

## **28-13-105. Prosecuting attorney — Duties.**

(a) When there are no known heirs or legal representatives, the prosecuting attorney for the district within which the courts are held wherein the accounts of any such administrator are required to be settled shall:

- (1) Examine the proceedings of the administration;
- (2) Cause process to be issued to compel the prompt settlement of his or her accounts;
- (3) Attend the settlement, when necessary, on behalf of the county;
- (4) Contest any item which to him or her shall appear unjust or unreasonable; and
- (5) In case of waste and mismanagement of the estate, or other maladministration, cause proper suits and proceedings to be instituted and prosecuted.

(b) He or she is required, in behalf of the county, to do all things touching the administration which could be done by any sole heir, and



especially to preserve the real estate from being improperly sold, wasted, or damaged.

(c) It is made his or her special duty, by himself or herself or his or her deputy, whom he or she may make, when inconvenient to attend in person, to attend all the courts in his or her district in which any case under this chapter may be pending.

**History.** Rev. Stat., ch. 57, §§ 8, 9; C. & §§ 5094, 5095; Acts 1985, No. 703, § 4; M. Dig., §§ 4085, 4086; Pope's Dig., A.S.A. 1947, §§ 62-1808, 62-1809.

### **28-13-106. Escheat of real property — Proceedings.**

(a)(1) When the prosecuting attorney for the district has been informed or has reason to believe that any real estate within his or her district has escheated to the county and the estate has not been sold, according to law, within three (3) years after the death of the person last seized for the payment of the debts of the deceased, he or she shall file an information, in behalf of the county, in the circuit court of the county in which the estate is situated.

(2) The information shall set forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants and persons claiming the estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, and alleging that, by reason thereof, the county has the right to the estate.

(b) The court shall award and issue a scire facias against the person, bodies politic or corporate, who are alleged in the information to hold, possess, or claim the estate, requiring them to appear and show cause why the estate should not be vested in the county, at the next term of the court.

(c) The scire facias shall be served fifteen (15) days before the return day thereof.

(d) The court shall make an order setting forth briefly the contents of the information and requiring all persons interested in the estate to appear and show cause, at the next term of the court, why the estate shall not be vested in the county. The order shall be published for four (4) weeks in a newspaper printed in the county.

(e) All persons, bodies politic and bodies corporate, named in the information as terre-tenants or claimants of the estate may appear and plead to the proceeding and may traverse the facts stated in the information or the title of the county to the lands and tenements therein mentioned at any time on or before the third day after the return of the scire facias. Any other person claiming an interest in the estate may appear and be made defendant and plead by motion for that purpose in open court within the time allowed for pleading.

(f) If any person appears and denies the title set up by the county, or traverses any material fact in the information, issue shall be made up and tried as other issues of fact.

(g) A survey may be ordered as in other cases where the titles or boundaries of land are drawn in question.



**History.** Rev. Stat., ch. 57, §§ 10-13, 1985, No. 703, § 4; A.S.A. 1947, §§ 62-15; C. & M. Dig., §§ 4087-4090, 4092; 1810 — 62-1813, 62-1815.  
Pope's Dig., §§ 5096-5099, 5101; Acts

### CASE NOTES

**Cited:** Newton County v. West, 293 Ark. 461, 739 S.W.2d 141 (1987).

#### 28-13-107. Escheat of real property — Judgments.

(a) If no person appears and pleads, or, appearing, refuses to plead within the term, then judgment shall be rendered that the county is seized of the lands and tenements in the information claimed.

(b)(1) If, after the issues are tried, it appears from the facts found or admitted that the county has good title to the lands and tenements in the information mentioned, or any part thereof, then judgment shall be rendered that the county is seized thereof and shall recover costs against the defendant.

(2) When any judgment shall be rendered that the county is seized of any real estate, the judgment shall contain a description of the real estate and shall vest the title in the county.

(c)(1) If it appears that the county has no title in the estate, the defendant shall recover his or her costs, to be taxed and certified by the clerk. Upon the certificate's being filed in his or her office, the county treasurer shall issue a warrant therefor on the treasury of the county, which shall be paid as other demands on the treasury.

(2) However, no defendant shall be entitled to recover costs unless the title to the estate appears to the court, by the facts found, to be in him or her.

**History.** Rev. Stat., ch. 57, §§ 14, 16-18; C. & M. Dig., §§ 4091, 4093-4095; 1985, No. 703, § 4; A.S.A. 1947, §§ 62-1814, 62-1816 — 62-1818.  
Pope's Dig., §§ 5100, 5102-5104; Acts

### CASE NOTES

**Cited:** Newton County v. West, 293 Ark. 461, 739 S.W.2d 141 (1987).

#### 28-13-108. Escheat of real property — Vesting title in county.

(a) A writ shall be issued to the sheriff of the proper county commanding the sheriff to seize the real estate vested in the county.

(b) Upon the return of the writ of seizure, the prosecuting attorney for the district shall:

(1) Cause the record and process to be exemplified under the seal of the court;

(2) Deposit the record and process in the office of the county treasurer; and

(3) Cause a transcript of the judgment to be recorded in the office of the recorder of the county in which the lands lie.

(c) The judgment shall preclude all parties and privies thereto, their heirs and assigns, so long as the judgment shall remain in force.

**History.** Rev. Stat., ch. 57, §§ 19, 20; C. §§ 5105, 5106; Acts 1985, No. 703, § 4; & M. Dig., §§ 4096, 4097; Pope's Dig., A.S.A. 1947, §§ 62-1819, 62-1820.

### **28-13-109. Sale of escheated real estate.**

(a) The county judge may cause the estate to be sold at any time after seizure, in such manner as may be provided by the quorum court. In such a case, the claimants shall be entitled to the proceeds, in lieu of the real estate, upon obtaining a decree or order reclaiming the escheated property, as provided for in § 28-13-110.

(b) All lands escheated to the State of Arkansas under the provisions of law shall be sold in the manner provided in this section.

(c) The Commissioner of State Lands shall cause the lands to be sold by the sheriffs of the several counties in which the lands may be situated, at the courthouse door in the county, at public auction for cash, on the first day of the circuit court, but first giving four (4) weeks' notice of the time, place, and terms of the sale and published in a newspaper published in the county. If there is no newspaper therein, then publication shall be by notices posted at six (6) of the most public places in the county four (4) weeks before the day of sale.

(d) Immediately upon the receipt of the purchase money, the sheriff shall pay the purchase money over to the Treasurer of State for use of the Public School Fund of the state and report the sale and the amount for which the lands were sold to the Commissioner of State Lands who shall make and keep a record thereof in his or her office.

(e) If the Commissioner of State Lands shall find the sale to have been in conformity to law and the purchase money fully paid, he or she shall execute a deed under his or her hand and official seal conveying all the title of the state in the lands to the purchaser. The deed, duly executed, shall be admitted to record and received as evidence in all the courts of this state.

(f) As compensation for his or her services in making the sale, the sheriff shall receive two percent (2%) upon the amount of the purchase money received for the land and, also, the actual cost of advertising the sale. These amounts are to be deducted from the purchase money received at the sale.

**History.** Rev. Stat., ch. 57, § 28; Acts 1885, No. 18, §§ 1-4, p. 22; C. & M. Dig., §§ 4105-4109; Pope's Dig., §§ 5114-5118; Acts 1985, No. 703, § 5; A.S.A. 1947, §§ 62-1828 — 62-1832.

### **28-13-110. Reclamation of escheated property.**

(a)(1)(A) If any person appears within seven (7) years after the death of the intestate and claims any money paid into the treasury under this chapter as heir or legal representative, he or she may file a petition in the circuit court in the county in which the decedent



resided at death, stating the nature of his or her claim and praying that such money may be paid to him or her.

(B) A copy of the petition shall be served on the prosecuting attorney for the district, who shall put in an answer to the petition.

(2) The court shall examine the claim and the allegations and proofs. If it finds that the person is entitled to any money paid into the treasury, the court shall make an order directing the county treasurer to issue his or her warrant on the county treasurer for the payment of the money, but without interest or costs. A copy of the order, under the seal of the court, shall be a sufficient voucher for issuing the warrant.

(b)(1) If any person appears and claims lands vested in the county within seven (7) years after the death of the last person seized, the person, other than one who was served with scire facias or appeared to the proceeding or the person's heirs or assigns, may file his or her petition in the circuit court in the county or district where the land may lie, setting forth the nature of his or her demand or claim and praying that the estate may be relinquished to him or her.

(2) A copy of the petition shall be served on the prosecuting attorney for the district, who shall answer it. The court shall examine the claim and allegations, together with such proof as may be adduced.

(3) If it appears that the person is entitled to the lands, the court shall decree accordingly. The decree shall divest the interest of the county in the estate. However, no costs shall be adjudged against the county in such a case.

(c) All persons who fail to appear and file their petitions within the time limited shall be forever barred, except the usual saving to infants.

**History.** Rev. Stat., ch. 57, §§ 23-27; C. §§ 5109-5113; Acts 1985, No. 703, § 4; & M. Dig., §§ 4100-4104; Pope's Dig., A.S.A. 1947, §§ 62-1823 — 62-1827.

## CASE NOTES

**Cited:** *Newton County v. West*, 293 Ark. 461, 739 S.W.2d 141 (1987).

### 28-13-111. Review of proceedings.

Any party who has appeared to any proceedings, and the prosecuting attorney for the circuit on behalf of the county, shall have the right to prosecute an appeal or writ of error upon the judgment.

**History.** Rev. Stat., ch. 57, § 21; C. & 1985, No. 703, § 4; A.S.A. 1947, § 62-M. Dig., § 4098; Pope's Dig., § 5107; Acts 1821.

### 28-13-112. County treasurer's duties.

The county treasurer shall keep just accounts of all moneys paid into the treasury and of all lands vested in the county under the provisions of this chapter.

**History.** Rev. Stat., ch. 57, § 22; C. & 1985, No. 703, § 4; A.S.A. 1947, § 62-M. Dig., § 4099; Pope's Dig., § 5108; Acts 1822.



**CHAPTER 14**  
**UNIFORM TOD SECURITY REGISTRATION ACT**

**SECTION.**

- 28-14-101. Definitions.
- 28-14-102. Registration in beneficiary form — Sole or joint tenancy ownership.
- 28-14-103. Registration in beneficiary form — Applicable law.
- 28-14-104. Origination of registration in beneficiary form.
- 28-14-105. Form of registration in beneficiary form.
- 28-14-106. Effect of registration in beneficiary form.

**SECTION.**

- 28-14-107. Ownership on death of owner.
- 28-14-108. Protection of registering entity.
- 28-14-109. Nontestamentary transfer on death.
- 28-14-110. Terms, conditions, and forms for registration.
- 28-14-111. Short title — Rules of construction.
- 28-14-112. Application of act.

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**Publisher's Notes.** For Comments regarding the Uniform Transfer on Death Security Registration Act, see Commentaries Volume B.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Legislative Survey, Miscellaneous, 16 U. Ark. Little Rock L.J. 161.

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**28-14-101. Definitions.**

In this chapter, unless the context otherwise requires:

- (1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.
- (2) "Devisee" means any person designated in a will to receive a disposition of real or personal property.
- (3) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.
- (4) "Person" means an individual, a corporation, an organization, or other legal entity.
- (5) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.
- (6) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(7) “Register,” including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) “Registering entity” means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) “Security” means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(10) “Security account” means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner’s death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner’s death.

(11) “State” includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

**History.** Acts 1993, No. 114, § 1.

## RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

## CASE NOTES

**Cited:** Ginsburg v. Ginsburg, 359 Ark. 226, 195 S.W.3d 898 (2004).

### **28-14-102. Registration in beneficiary form — Sole or joint tenancy ownership.**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

**History.** Acts 1993, No. 114, § 2.

**28-14-103. Registration in beneficiary form — Applicable law.**

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

**History.** Acts 1993, No. 114, § 3.

**28-14-104. Origination of registration in beneficiary form.**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

**History.** Acts 1993, No. 114, § 4.

**28-14-105. Form of registration in beneficiary form.**

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary.

**History.** Acts 1993, No. 114, § 5.

**28-14-106. Effect of registration in beneficiary form.**

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

**History.** Acts 1993, No. 114, § 6.

**CASE NOTES**

**Cited:** Ginsburg v. Ginsburg, 359 Ark. 226, 195 S.W.3d 898 (2004).



**28-14-107. Ownership on death of owner.**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

**History.** Acts 1993, No. 114, § 7.

**CASE NOTES****Separate Property.**

Administratrix, wife of the decedent, who sought to divorce the decedent but reconciled shortly before the decedent's death, convinced the trial court the monies in a transfer-on-death account (TOD account) naming children from the decedent's former marriage as the beneficiaries was a fraudulent transfer; if the TOD account was owned by both the decedent and the administratrix, the administratrix could claim dower rights in the property, but decedent's children presented compelling facts that the account was separate property owned by the decedent, and the trial court erred in granting summary judgment in favor of the administratrix. *Ginsburg v. Ginsburg*, 353 Ark. 816, 120 S.W.3d 567 (2003).

Where decedent and his surviving

spouse were married for only four years, the trial court did not clearly err in finding that the transfer-on-death (TOD) account was the sole and separate property of decedent's three children by a prior marriage as the named beneficiaries of the TOD account; the funds used to purchase the account were gained as the result of the sale of decedent's business, which he acquired before his marriage to the surviving spouse and continued to hold as his separate property during the course of the marriage, and the surviving spouse admittedly had no ownership interest in the business, nor was their commingling of any funds between the surviving spouse and the decedent once they were married. *Ginsburg v. Ginsburg*, 359 Ark. 226, 195 S.W.3d 898 (2004).

**28-14-108. Protection of registering entity.**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this chapter.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this chapter.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with § 28-14-107 and does so in

good faith reliance (i) on the registration, (ii) on this chapter, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this chapter do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this chapter.

(d) The protection provided by this chapter to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

**History.** Acts 1993, No. 114, § 8.

### **28-14-109. Nontestamentary transfer on death.**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and is not testamentary.

(b) This chapter does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

**History.** Acts 1993, No. 114, § 9.

### **CASE NOTES**

#### **Separate Property.**

Where decedent and his surviving spouse were married for only four years, the trial court did not clearly err in finding that the transfer-on-death (TOD) account was the sole and separate property of decedent's three children by a prior marriage as the named beneficiaries of the TOD account; the funds used to purchase the account were gained as the result of the sale of decedent's business, which he

acquired before his marriage to the surviving spouse and continued to hold as his separate property during the course of the marriage, and the surviving spouse admittedly had no ownership interest in the business, nor was their commingling of any funds between the surviving spouse and the decedent once they were married. *Ginsburg v. Ginsburg*, 359 Ark. 226, 195 S.W.3d 898 (2004).

### **28-14-110. Terms, conditions, and forms for registration.**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding



or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown *or* John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

**History.** Acts 1993, No. 114, § 10.

## **28-14-111. Short title — Rules of construction.**

(1) This chapter shall be known as and may be cited as the "Uniform TOD Security Registration Act."

(2) This chapter shall be liberally construed and applied to promote its underlying purposes and policy and to make uniform the laws with respect to the subject of this chapter among states enacting it.

(3) Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions.

**History.** Acts 1993, No. 114, § 11.

## **28-14-112. Application of act.**

This act applies to registrations of securities in beneficiary form made before or after August 13, 1993, by decedents dying on or after August 13, 1993.

**History.** Acts 1993, No. 114, § 12. 114, codified as §§ 28-14-101 — 28-14-112.  
**Meaning of "this act".** Acts 1993, No. 112.



## CASE NOTES

**Cited:** *Ginsburg v. Ginsburg*, 359 Ark. 226, 195 S.W.3d 898 (2004).

## CHAPTERS 15-23

[Reserved]

*SUBTITLE 3. WILLS*

## CHAPTER 24

## GENERAL PROVISIONS

## SECTION.

28-24-101. Contracts affecting the devise of property.

## SECTION.

28-24-102. Sale of property devised by ward not an ademption.

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RESEARCH REFERENCES

**Ark. L. Rev. Acts 1949** General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

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**28-24-101. Contracts affecting the devise of property.**

(a) A valid agreement made by a testator to convey property devised in a will previously made shall not revoke the previous devise, but the property shall pass by the will subject to the same remedies on the agreement against the devisee as might have been enforced against the decedent if he or she had survived.

(b)(1) However, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after June 17, 1981, can be established only by:

(A) Provisions of a will stating material provisions of the contract;

(B) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(C) A writing signed by the decedent evidencing the contract.

(2) The execution of a reciprocal or mutual will does not create a presumption of a contract not to revoke the will.

**History.** Acts 1949, No. 140, § 28; 1981, No. 658, § 1; A.S.A. 1947, § 60-412.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Brantley and Effland, *Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared*, 3 U. Ark. Little Rock L.J. 361.

Legislative Survey, *Decedents' Estates*, 4 U. Ark. Little Rock L.J. 591.

## CASE NOTES

## ANALYSIS

Applicability.  
Breach of Contract Not to Revoke.  
Breach of Contract to Devise.  
Constructive Trust.  
Evidence.  
Writing Signed by Decedent.

**Applicability.**

This section does not control a purported agreement to make a will made before 1981. *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

**Breach of Contract Not to Revoke.**

Section 23-32-1005 [23-32-207] does not preclude the establishment of a constructive trust when a contract not to revoke a will has been properly established and the money in a survivorship account has been transferred in violation of such a contract. *Avance v. Richards*, 331 Ark. 32, 959 S.W.2d 396 (1998).

**Breach of Contract to Devise.**

In suit for specific performance of oral contract to leave property to plaintiff, plaintiff's remedy is not against estate, but against devisees of the property, and a court of equity is the proper forum for a suit for specific performance. *Morton v. Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965).

**Constructive Trust.**

A constructive trust may be imposed despite the statute of frauds, because implied trusts, such as constructive trusts or resulting trusts, are specifically exempted from its application. *Cole v. Rivers*, 43 Ark. App. 123, 861 S.W.2d 551 (1993).

**Evidence.**

Contract to make a will not shown where the 1976 wills permitted discretionary disposition of personal property, did not contain words like "agreement to make mutual wills" or "agreeing that the survivor leaves his property to the heirs listed," and the other evidence presented was not clear, cogent, and convincing of the existence of such a contract. *Avance v. Richards*, 331 Ark. 32, 959 S.W.2d 396 (1998).

The chancellor's decision that there was no valid contract to make the appellant a beneficiary of the decedent's will was not clearly erroneous, notwithstanding testimony that after the decedent made the appellant the beneficiary of his will in October 1996, she agreed to keep house for him, cook his meals and take care of him, since neither that 1996 will nor the 1997 will at issue contained a statement of the material provisions of a contract between the decedent and the appellant and neither will contained an express reference to a contract between them. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999).

**Writing Signed by Decedent.**

The grant of a summary judgment against heirs was proper where settlement agreement was a valid, enforceable contract which the decedent's guardian had the authority to enter into on her behalf. *Hardie v. Estate of Davis*, 312 Ark. 189, 848 S.W.2d 417 (1993).

**Cited:** *Morris v. Cullipher*, 299 Ark. 204, 772 S.W.2d 313 (1989); *Mabry v. McAfee*, 301 Ark. 268, 783 S.W.2d 356 (1990).

**28-24-102. Sale of property devised by ward not an ademption.**

In case of a guardian's sale or other transfer of any real or personal property specifically devised by a ward who was competent to make the will, but was incompetent at the time of the sale or transfer and never

became competent thereafter, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may, at his or her option, take the value of the property at the time of the ward's death with the incidents of a general devise or take the proceeds thereof with the incidents of a specific devise.

**History.** Acts 1949, No. 140, § 30;  
A.S.A. 1947, § 60-414.

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

## CHAPTER 25

### EXECUTION AND REVOCATION

#### SECTION.

28-25-101. Who may make wills.  
28-25-102. Witnesses.  
28-25-103. Execution generally.  
28-25-104. Holographic wills generally.  
28-25-105. Foreign execution.  
28-25-106. Affidavit of attesting witness.  
28-25-107. Incorporation of writing by reference.

#### SECTION.

28-25-108. Deposit of will with court in testator's lifetime — Disposition.  
28-25-109. Revocation of wills.  
28-25-110. Revival of revoked or invalid will.

**Effective Dates.** Acts 1955, No. 106, § 3: Feb. 24, 1955. Emergency clause provided: "It is hereby determined by the General Assembly that many of the Probate Courts of this State are faced with crowded dockets and that the immediate passage of this Act will relieve such Courts of much of the time consumed in

probating uncontested wills and will thereby expedite the administration of justice. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force from and after its passage and approval."

### RESEARCH REFERENCES

**ALR.** Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will. 17 A.L.R.4th 167.

Revocation of prior will by revocation clause in lost will or other lost instrument. 31 A.L.R.4th 306.

Holographic wills: requirement that will be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 A.L.R.4th 528.

Sufficiency of provision for, or reference

to, prospective spouse to avoid lapse or revocation of will by subsequent marriage. 38 A.L.R.4th 117.

Electronic tape recording as will. 42 A.L.R.4th 176.

**Am. Jur.** 79 Am. Jur. 2d, Wills, §§ 4-149, 170-311, and § 467 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Case Notes — Wills — Integration and Revocation — Separate Instruments as One Will, 11 Ark. L. Rev. 196.



**C.J.S.** 95 C.J.S., Wills, § 3 et seq.

**U. Ark. Little Rock L.J.** A Critical Analysis of the Arkansas Death With Dignity Act, Simpson and Armbrust, 1 U. Ark. Little Rock L.J. 473.

Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate

Code Compared, 3 U. Ark. Little Rock L.J. 361.

Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

## 28-25-101. Who may make wills.

Any person of sound mind eighteen (18) years of age or older may make a will.

**History.** Acts 1949, No. 140, § 17; A.S.A. 1947, § 60-401.

**Cross References.** Aliens may devise property, § 18-11-101.

Separate property of femme covert devised by her as if she were a femme sole, Ark. Const., Art. 9, § 7.

## RESEARCH REFERENCES

**Ark. L. Rev.** Comment — A Survey of Testamentary Capacity — Proof, 11 Ark. L. Rev. 84.

## CASE NOTES

### ANALYSIS

Construction.

Burden of Proof.

Delusions.

Exclusion of Will Contestants.

Moral Insanity.

Old Age.

Review.

Tests of Capacity.

### Construction.

Although at the time of the execution of a will a statute provided that a woman under age 21 had no power to execute a will conveying real property, will executed by executor when she was only 18 years old was valid and properly probated where, prior to her death, the statute was changed to provide validity for wills of persons of 18 years of age who were in their right mind. *Hardy v. Ross*, 237 Ark. 76, 371 S.W.2d 522 (1963).

### Burden of Proof.

Under the issue of *devisavit vel non*, where the inquiry is whether the testator was of sound and disposing mind and free

from undue influence at the time of executing the will, the burden of proof is on the plaintiff. *Jenkins v. Tobin*, 31 Ark. 306 (1876) (decision under prior law).

In an action to contest a will, the burden of proof is on the contestant who asserts the mental incapacity of the testator. *Shippen v. Shippen*, 213 Ark. 517, 211 S.W.2d 433 (1948) (decision under prior law).

### Delusions.

The test of testamentary capacity is the same in the case of an insane delusion as in the case of dementia. *Taylor v. McClintock*, 87 Ark. 243, 112 S.W. 405 (1908) (decision under prior law).

### Exclusion of Will Contestants.

Since the testator may leave his property to anyone he chooses, he is at liberty to exclude from his bounty those beneficiaries who unsuccessfully seek to thwart his testamentary wishes. *Lytle v. Zebold*, 235 Ark. 17, 357 S.W.2d 20 (1962).

### Moral Insanity.

Moral insanity, manifested in jealousy, anger, hate, resentment, or other perver-

sion of the sentiment or affections, however violent or unnatural, will not defeat a will unless it is the emanation of a delusion. *Taylor v. McClintock*, 87 Ark. 243, 112 S.W. 405 (1908) (decision under prior law).

### Old Age.

A testator's old age, physical incapacity, and partial eclipse of the mind will not invalidate his will if he has sufficient capacity to remember the extent and condition of his property and who are his beneficiaries and to appreciate the deserts of his relatives. *Griffin v. Union Trust Co.*, 166 Ark. 347, 266 S.W. 289 (1924) (decision under prior law).

That an aged testator's memory was failing or that his judgment was vacillating or that he was becoming eccentric or that his mind was not as active as formerly does not invalidate the will if it was fairly made and was free from undue influence. *Pernot v. King*, 194 Ark. 896, 110 S.W.2d 539 (1937) (decision under prior law).

### Review.

Where the finding of mental incompetency of testator is not against the preponderance of the testimony, the decree will be affirmed. *Boylend v. Boyland*, 211 Ark. 925, 203 S.W.2d 192 (1947) (decision under prior law).

## 28-25-102. Witnesses.

(a) Any person, eighteen (18) years of age or older, competent to be witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness, but an interested witness, unless the will is also attested by two (2) qualified disinterested witnesses, shall forfeit so much of the provision therein made for him or her as in the aggregate exceeds in value, as of the date of the testator's death, what he or she would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to him or her some beneficial interest by way of devise.

(d) An attesting witness, even though interested, may be compelled to testify with respect to the will.

### Tests of Capacity.

The capacity to make a will is of such a degree of reason and judgment as to enable the party to comprehend the subject. *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1855); *Abraham v. Wilkins*, 17 Ark. 292 (1856) (decision under prior law).

The capacity to make a will is such as requires sufficient mind to contract, free from such undue influences as constrain the party to act against his will or subdue the will until it ceases to act for itself and acts under the dictates of the will of another. *Tobin v. Jenkins*, 29 Ark. 151 (1874) (decision under prior law).

The test of testamentary capacity is that the testator shall have the capacity to retain in memory, without prompting, the extent and condition of his property, to comprehend to whom he is giving it, and to appreciate the deserts and relation to him of others whom he excludes from participation in his estate. *Taylor v. McClintock*, 87 Ark. 243, 112 S.W. 405 (1908) (decision under prior law).

It was error, in a will contest, to instruct the jury that a testator in order to be capable of making a will must have "a full knowledge of the property he possesses"; rather, the true test with respect to his property was not whether he knew, but whether he was mentally capable of knowing, what property he possessed. *Huffaker v. Beers*, 95 Ark. 158, 128 S.W. 1040 (1910) (decision under prior law).

**History.** Acts 1949, No. 140, § 18; A.S.A. 1947, § 60-402.



## CASE NOTES

## ANALYSIS

Age of Witness.

Attestation.

Attorney.

Beneficiary Not a Witness.

Executor as Witness.

Husband and Wife.

Signed by Mark.

Voluntary Release.

**Age of Witness.**

The requirement that an attesting witness must be 18 years of age or older is unequivocal and leaves no room for judicial interpretation or substantial compliance. *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999).

**Attestation.**

Where an attestation is dated one month earlier than a will, the will is still valid if there is no dispute that the will was signed by the testator and attested by the witnesses on the same date. *Miller v. Mitchell*, 224 Ark. 585, 275 S.W.2d 3 (1955).

**Attorney.**

Although the law firm with which he was associated was named to represent the estate, attorney signing will as one of two attesting witnesses was qualified, no beneficial interest having been devised to him. *Rosenbaum v. Cahn*, 234 Ark. 290, 351 S.W.2d 857 (1961).

Attorney who drafted will and witnessed it, but who was not named in the will, was competent to testify as an attesting witness. *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963).

**Beneficiary Not a Witness.**

A beneficiary who is not an attesting witness may testify. *Strickland v. Smith*, 131 Ark. 350, 198 S.W. 690 (1917) (decision under prior law).

**Executor as Witness.**

The executor of a will, as a rule, is competent as a subscribing witness to its

execution, as his interest is derived from the statute and not from the will itself, the word "appointment" referring to some appointment coupled with a beneficial interest. *Fontaine v. Fontaine*, 169 Ark. 1077, 277 S.W. 867 (1925) (decision under prior law).

**Husband and Wife.**

Husband who is one of the subscribing witnesses to a will is not disqualified from testifying as to its due execution before the probate court because of the fact that his wife is a legatee, since statute rendering husband or wife incompetent from testifying for or against each other in civil actions does not apply to probate of wills. *Rockafellow v. Rockafellow*, 192 Ark. 563, 93 S.W.2d 321 (1936) (decision under prior law).

Subscribing witness to will whose wife was beneficiary thereunder was competent witness in proceeding to contest the will where wife had previously disclaimed her testamentary bequest and was no longer a party to the suit. *Rockafellow v. Rockafellow*, 192 Ark. 563, 93 S.W.2d 321 (1936) (decision under prior law).

**Signed by Mark.**

A will is valid as properly executed by substantial compliance with the statutes where the testator signs it with his mark and an unknown person writes the testator's name next to his mark and there are three attesting witnesses. *Miller v. Mitchell*, 224 Ark. 585, 275 S.W.2d 3 (1955).

**Voluntary Release.**

One of the necessary subscribing or attesting witnesses to a will who is a beneficiary therein may become competent by voluntarily releasing his bequest. *Rockafellow v. Rockafellow*, 192 Ark. 563, 93 S.W.2d 321 (1936) (decision under prior law).

**Cited:** *Parker v. Parker*, 237 Ark. 942, 377 S.W.2d 160 (1964).

**28-25-103. Execution generally.**

(a) The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.



(b)(1) The testator shall declare to the attesting witnesses that the instrument is his or her will and either:

- (A) Himself or herself sign;
- (B) Acknowledge his or her signature already made;
- (C) Sign by mark, his or her name being written near it and witnessed by a person who writes his or her own name as witness to the signature; or
- (D)(i) At his or her discretion and in his or her presence have someone else sign his or her name for him or her.

(ii) The person so signing shall write his or her own name and state that he or she signed the testator's name at the request of the testator.

(2) In any of the cases listed in subdivision (b)(1) of this section:

- (A) The signature must be at the end of the instrument; and
- (B) The act must be done in the presence of two (2) or more attesting witnesses.

(c) The attesting witnesses must sign at the request and in the presence of the testator.

**History.** Acts 1949, No. 140, § 19;  
A.S.A. 1947, § 60-403.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Note, Validity of Signature for Attested Wills, 4 U. Ark. Little Rock L.J. 139.

## CASE NOTES

### ANALYSIS

In General.  
Construction.  
Acknowledgment by Testator.  
Attestation by Witnesses.  
Attorney as Witness.  
Blind Persons.  
Burden of Proof.  
Declaration of Testator.  
Evidence Generally.  
Evidence of Testamentary Intent.  
Failure to Comply.  
Holographic Will.  
Mandatory Nature.  
Notary as Witness.  
Presumption of Due Execution.  
Proof of Execution.  
Publication.  
Republication.  
Request of Testator.  
Signature Generally.  
Signature of Testator.  
Signed by Mark.

Statutory Policy.  
Subsequent Ex Parte Affidavit Inadmissible.

Validity of Execution.  
Witness to Execution.  
Words Following Signature.

### In General.

The purpose of the law relating to the execution of wills is to protect testamentary conveyances against fraud and deception and not to impede them by technicalities. *Hanel v. Springle*, 237 Ark. 356, 372 S.W.2d 822 (1963).

### Construction.

The requirements for establishing an attested will must be read together and construed to permit establishment of the will by any legally admissible evidence or requisite facts in order that the testatrix's wishes may not be thwarted by straight-laced construction of statutory language where there is no indication of fraud, deception, imposition, or undue influence.

*Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983).

Where there is no indication of fraud, deception, undue influence, or imposition, a court may avoid a strict technical construction of the statutory requirements in order to give effect to the testator's wishes. *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985).

This section is mandatory in order to validate a nonholographic will. *Shamoon v. Tombridge*, 291 Ark. 222, 723 S.W.2d 827 (1987).

#### **Acknowledgment by Testator.**

Testator's statement to attesting witness that the instrument was his will raises presumption, in the absence of proof to the contrary, that testator's signature was on the will and it was an acknowledgment to testator's subscription to the will in compliance with statutory requirements. *Anthony v. College of Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944), superseded by statute as stated in, *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991) (decision under prior law).

If, without referring to instrument as his will, testator produces it with his signature visible, and requests witness to sign it, this is a sufficient acknowledgment. *Anthony v. College of Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944), superseded by statute as stated in, *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991) (decision under prior law).

Testator may acknowledge his signature by his acts and gestures, without making any express acknowledgment of the signature in words. *Anthony v. College of Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944), superseded by statute as stated in, *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991) (decision under prior law).

The fact of publication can be inferred from all of the circumstances attending the execution of the will; a testator may acknowledge his signature by acts and gestures without expressing it in words. *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983).

Once the signing of a will is proven by two attesting witnesses, and there is no suggestion of fraud or undue influence, there is a presumption that the testator declared to the attesting witnesses that

the instrument was his will; and that he either signed in front of them or acknowledged to them his signature on the instrument; and that the attesting witnesses signed at the request of and in the presence of the testator. *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991).

Trial court did not err in finding substantial compliance with the requirement of declaring one's will to the witnesses where, even had the decedent not declared to one of the witnesses that it was her last will and testament, nor had she specifically asked either witness to sign it, the witness was standing by as the handwritten document was read back to the decedent, and the witness understood the document to have been the decedent's last will and testament. *Fischer v. Kinzalow*, 88 Ark. App. 307, 198 S.W.3d 555 (2004).

#### **Attestation by Witnesses.**

Previously it was held that it was not necessary that witnesses to a will subscribe in the presence, actual or constructive, of the testator. *Abraham v. Wilkins*, 17 Ark. 292 (1856) (decision under prior law).

An attesting witness to a will may subscribe by mark, although the person who writes the name fails to sign his name as a witness in fact. *Davis v. Semmes*, 51 Ark. 48, 9 S.W. 434 (1888) (decision under prior law).

A will was duly executed where it was subscribed in the presence of one attesting witness and then taken by the testator to a justice of the peace to whom he pointed out his signature, declared the writing to be his will, and procured the justice to sign and certify the will in his official capacity. The certificate, though superfluous, did not vitiate the attestation by the justice. *Payne v. Payne*, 54 Ark. 415, 16 S.W. 1 (1891) (decision under prior law).

A will cannot be admitted to probate where the signature of the testator is attested by only one witness. *Johnson v. Hinton*, 130 Ark. 394, 197 S.W. 706 (1917) (decision under prior law).

A will signed by a mark in the presence of justice of peace who did not write his own name as witness and by two witnesses out of the presence of the testator and not at her request was held invalid. *Graves v. Bowles*, 193 Ark. 546, 101 S.W.2d 176 (1937) (decision under prior law).



A will signed by one witness who was a total stranger to testator and to other witness several days after it was executed by testator and signed by the other witness was rejected as not having been properly attested. *Hendry v. Wilson*, 202 Ark. 580, 151 S.W.2d 683 (1941) (decision under prior law).

Where an attestation is dated one month earlier than a will, the will is still valid if there is no dispute that the will was signed by the testator and attested by the witnesses on the same date. *Miller v. Mitchell*, 224 Ark. 585, 275 S.W.2d 3 (1955).

There has never been any requirement in Arkansas that the two witnesses to a will sign in the presence of each other, and this section has not changed the law in that respect. *Coleman v. Walls*, 241 Ark. 842, 410 S.W.2d 749 (1967); *Upton v. Upton*, 26 Ark. App. 78, 759 S.W.2d 811 (1988).

Although the will probably qualified as a holographic will, since it was signed at the end by the testator, in the presence of two attesting witnesses as required by this section, the evidence was sufficient to establish the will as an attested will. *Walpole v. Lewis*, 254 Ark. 89, 492 S.W.2d 410 (1973).

Where the testator signs his will with an "X", this section requires a minimum of three subscribing witnesses to make the will in question valid. *Shamoon v. Tombridge*, 291 Ark. 222, 723 S.W.2d 827 (1987).

Statutory formalities specifically required the testatrix, who signed by a mark, to have a witness who signed the document attesting to her mark and two attesting witnesses to sign at end of the instrument to constitute a validly executed will; although three witnesses attested to the execution of the will, the will did not refer to any witness as being a special witness to the mark, and therefore, the will was invalid because the writing of the testatrix's name by the witness to the mark was not done in the presence of two attesting witnesses. *Smith v. Wharton*, 349 Ark. 351, 78 S.W.3d 79 (2002).

Witness was within the range of the testator's senses while in an adjacent room with the door open to the testatrix's bedroom; thus, he was in the presence of the testator at the time he subscribed his

name to the testatrix's will. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004).

### **Attorney as Witness.**

An attorney who drafted a will and witnessed it, but who was not named in the will, was competent to testify as an attesting witness. *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963).

### **Blind Persons.**

Where a blind person held the pen and another guided her hand in signing her will, the signature was the act of the testator, and it was not necessary for the person guiding her hand to sign the will as an attesting witness to the signature. *Coleman v. Walls*, 241 Ark. 842, 410 S.W.2d 749 (1967).

A will signed by blind person by mark with assistance from the sole beneficiary and witnessed by two other people is valid. *Patrick v. Rankin*, 256 Ark. 310, 506 S.W.2d 853 (1974).

### **Burden of Proof.**

Production of a written paper purporting to be the will of a deceased person which is rational on its face, and which is proved to have been executed and witnessed in accordance with statutory requirements makes a prima facie case and devolves upon the contestants the onus of showing the testator's incompetency. *Gray v. Fulton*, 205 Ark. 675, 170 S.W.2d 384 (1943) (decision under prior law).

When surviving son offered the will for probate, he had the burden of proving the genuineness of the signatures. Where he made such proof and the will was admitted to probate, the appellants who sought to contest the will within the six-month period had the burden of sustaining the contest on the alleged ground that the signatures to the will were a forgery. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

### **Declaration of Testator.**

The testator is not required to use any particular words in declaring an instrument to be his last will and testament. *Evans v. Evans*, 193 Ark. 585, 101 S.W.2d 435 (1937) (decision under prior law).

### **Evidence Generally.**

Evidence supported finding of probate court that will offered for probate was executed in accordance with this section.



Edwards v. Knowles, 225 Ark. 1024, 287 S.W.2d 449 (1956); Upton v. Upton, 26 Ark. App. 78, 759 S.W.2d 811 (1988).

Parol evidence may not be introduced by the witness to a testator's mark to supply the deficiency of the required additional witness' signature. Green v. Smith, 236 Ark. 829, 368 S.W.2d 280 (1963).

### **Evidence of Testamentary Intent.**

Where a written instrument was executed as a will but only one witness signed it and the instrument, along with two letters written by the deceased to his wife, was offered for probate on the ground that purported typewritten will became part of a valid will when coupled with the letters written by the deceased in his own handwriting to his wife, court erred in overruling demurrer to petition to probate where there was no evidence whatever to the effect that he intended that either the letter should constitute a will or that it be used in connection with any other document or instrument so as to constitute a will. Smith v. Nelson, 227 Ark. 512, 299 S.W.2d 645 (1957).

It is not necessary that deceased specifically request the witnesses to sign his will. Thus where a deceased's actions showed that he knew he was making a will, that he was asked if he wanted any of his property to go to a certain person and he explained why he did not, and that he signed the instrument in front of the witnesses and permitted them to sign as witnesses, the statutory provisions were substantially complied with. Hanel v. Springle, 237 Ark. 356, 372 S.W.2d 822 (1963).

Where a document sets forth no words of a dispositive nature, it is defective on its face because it lacks the required intent to make a will, and extrinsic evidence is not admissible to prove the necessary intent. Dunn v. Means, 304 Ark. 473, 803 S.W.2d 542 (1991).

### **Failure to Comply.**

Where a testator's name is signed to a will by his direction and he does nothing more thereby adopting such signature as his subscription, the person so signing for the testator must also write his own name as a witness and state that he signed the testator's name at his request. Statutory provisions did not apply, however, where the testator signed himself by making his

mark. In re Will of Cornelius, 14 Ark. 675 (1854); Guthrie v. Price, 23 Ark. 396 (1861) (decision under prior law).

Where testator's name is signed by another at his request and the testator then signs by mark and the other person signing testator's name does not subscribe his own name as required, it is necessary that the genuineness of the signature by mark be established by other means. Hightower v. Hightower, 128 Ark. 95, 193 S.W. 518 (1917) (decision under prior law).

### **Holographic Will.**

Where the decedent's unaltered, handwritten will, which was signed by him and witnessed by one witness was found to be a holographic will which was valid pursuant to § 28-25-104, it was not necessary to further test the will's validity as an attested will under this section since a holographic will can satisfy the requirements of both sections. Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981).

### **Mandatory Nature.**

The validity of a will depends on compliance with statutory requirements rather than on the good memory of one of the witnesses. Evans v. Evans, 193 Ark. 585, 101 S.W.2d 435 (1937) (decision under prior law).

### **Notary as Witness.**

Where will was signed by decedent with an "X" and attested by two witnesses and a proof of will was acknowledged by a notary public, the notary public's signature on the proof of will form did not amount to a third signature. Shamoon v. Tombridge, 291 Ark. 222, 723 S.W.2d 827 (1987).

### **Presumption of Due Execution.**

Although no presumption of due execution of a will arises from the mere production of an instrument purporting to be a will, if it appears to have been duly executed and the attestation is established by the witnesses to its execution, although they do not remember the transaction, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with the requirements of law including those as to attestation in the presence of the testator and affixing the testator's signature prior to those of the witnesses. Green v. Holland, 9

Ark. App. 233, 657 S.W.2d 572 (1983); *Upton v. Upton*, 26 Ark. App. 78, 759 S.W.2d 811 (1988).

### **Proof of Execution.**

Execution of a will may be sufficiently proved where one witness testifies positively to the requisites of execution, though another does not recall some of the requisites, especially where testimony is given several years after execution of the will. *Evans v. Evans*, 193 Ark. 585, 101 S.W.2d 435 (1937) (decision under prior law).

No presumption of due execution arises from mere production of an instrument purporting to be a last will and testament, but where the instrument appears to have been duly executed as a will, and the attestation is established by proof of the handwriting of the witnesses or otherwise, although their testimony is not available, or they do not remember the transaction, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with all the requirements of law. *Anthony v. College of Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944), superseded by statute as stated in, *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991) (decision under prior law).

### **Publication.**

The requirement that the testator declare the instrument to be a will is called publication; it is not required that a testator recite precisely the words "this is my will," although that is the preferred practice; rather, publication can be inferred from actions and circumstances. *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985).

### **Republication.**

A codicil, duly executed, will operate as a republication of an earlier will although the earlier will was inoperative or imperfectly executed or attested. *Rogers v. Agriola*, 176 Ark. 287, 3 S.W.2d 26 (1928) (decision under prior law).

### **Request of Testator.**

It is not necessary that each witness should prove that both signed at the request of the testator. *Rogers v. Diamond*, 13 Ark. 474 (1853) (decision under prior law).

Each of the attesting witnesses must sign his name as a witness at the request

of the testator; however, such a request may be inferred from the attendant circumstances, by signs, or by gestures, as well as words, as by the testator desiring the witness to be sent for to attest the execution of the will or from a request made to such witnesses by another person in the presence of the testator. *Rogers v. Diamond*, 13 Ark. 474 (1853) (decision under prior law).

### **Signature Generally.**

Will was signed by testator and duly witnessed according to law where testimony by witnesses showed that testator requested witnesses for her will and duly signed the will in their presence and that witnesses then signed the will as witnesses in presence of testator. *Meek v. Bledsoe*, 221 Ark. 395, 253 S.W.2d 369 (1952).

Where the testator and both attesting witnesses were dead, all the contestants had to do was to prove that any one of the three signatures was a forgery in order to defeat probate since a valid will, other than a holographic one, must have two witnesses. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

It is essential to due execution of a will that it be signed or subscribed by the number of witnesses required by law governing the particular will being made, and subscription by fewer renders the transaction a nullity. *Ash v. Morgan*, 232 Ark. 602, 339 S.W.2d 309 (1960).

While substantial compliance with the procedure in subdivision (b)(5) of this section has been held sufficient in some situations, it has never been extended to allow a witness to attest a will before the testator signs it and who in fact never sees the testator sign. *Burns v. Adamson*, 313 Ark. 281, 854 S.W.2d 723 (1993).

### **Signature of Testator.**

A testator may sign his will by an abbreviation of his full name or merely by initials. *Cartwright v. Cartwright*, 158 Ark. 278, 250 S.W. 11 (1923) (decision under prior law).

Where contestants, in a proceeding to probate a will, denied that deceased signed the will, it was competent for them to prove that she did not sign because she could not write. *Watts v. Tidwell*, 178 Ark. 951, 12 S.W.2d 896 (1929) (decision under prior law).



The purpose of the requirement that subscription be at end of a will is to prevent fraud. *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880 (1951) (decision under prior law).

The signature of the testator at the end of a holographic will is not requisite to its validity. *Smith v. MacDonald*, 252 Ark. 931, 481 S.W.2d 741 (1972).

Where the testator places his signature in the attestation clause because he believes that it belongs there and with the requisite testamentary intent, it constitutes a sufficient compliance with this section requiring the signature to be at the end. *Scratchfield v. Loyd*, 267 Ark. 24, 589 S.W.2d 557 (1979).

When a testator presents a will to a witness, the presumption is, in the absence of proof to the contrary, that the testator's signature is on the will; where there is clear evidence to the contrary, no presumption is permissible. *Burns v. Adamson*, 313 Ark. 281, 854 S.W.2d 723 (1993).

### **Signed by Mark.**

A will is valid as properly executed by substantial compliance with the statutes where the testator signs it with his mark and an unknown person writes the testator's name next to his mark and there are three attesting witnesses. *Miller v. Mitchell*, 224 Ark. 585, 275 S.W.2d 3 (1955).

Where a will is signed by testator's mark, it is mandatory that a minimum of three signatures be attached, one to witness the testator's mark and two to attest the will. *Green v. Smith*, 236 Ark. 829, 368 S.W.2d 280 (1963).

Where a will is signed by testator's mark, the mark must be witnessed by the signature of the party who wrote the testator's name and the signatures of two attending witnesses. *Green v. Smith*, 236 Ark. 829, 368 S.W.2d 280 (1963).

One who witnesses the mark of a testator cannot also sign as a witness to the will. *Priola v. Priola*, 237 Ark. 798, 377 S.W.2d 29 (Ark. 1964).

Where testator made an "X" on his will and the drafting attorney then wrote testator's name next to the mark, after which two other witnesses signed the will as witnesses, the will was properly executed, since this section does not require that the person who writes the name of the testator near his mark must also sign as a

witness to the signature or as a witness to the will itself. *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981).

### **Statutory Policy.**

The policy of statutory requirements is to guard against frauds in the execution of wills. *Anthony v. College of Ozarks*, 207 Ark. 212, 180 S.W.2d 321 (1944), superseded by statute as stated in, *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991) (decision under prior law).

### **Subsequent Ex Parte Affidavit Inadmissible.**

Where a testator signed a will by his mark and the party who signed his name failed to attest the signature by writing his own name as witness, an ex parte affidavit by the witness that he wrote the deceased's name for him and witnessed the making of his mark by the deceased is inadmissible; there then being no proof of the deceased's signature, the will is not entitled to probate. *Hightower v. Hightower*, 128 Ark. 95, 193 S.W. 518 (1917) (decision under prior law).

### **Validity of Execution.**

Where neither of the alleged attesting witnesses signed in the presence of the testator, nor in the presence of each other, the will was not validly executed. *Ash v. Morgan*, 232 Ark. 602, 339 S.W.2d 309 (1960).

Where the record shows that the witnesses understood the paper signed was the will of testator and that he expected and desired them to sign as witnesses, and testator signed will in their presence and they signed as witnesses in the presence of the testator, there was substantial compliance with this section, although the witnesses could not say positively that testator actually said it was his will or that he literally requested them to sign it as witnesses. *Hollingsworth v. Hollingsworth*, 240 Ark. 582, 401 S.W.2d 555 (1966).

Where both witnesses to the execution of a will were unable to definitely testify that they saw the testator sign the will, but one witness testified that he did not believe that he would have signed the attestation clause unless decedent had signed the will in his presence and the other witness testified that he was "pretty sure" that he had seen decedent sign his name, the will was validly executed under



this section. *Pennington v. Pennington*, 1 Ark. App. 311, 615 S.W.2d 391 (1981).

Where testator went to attorney's office for the specific purpose of making a will and did so and no one questioned the genuineness of her signature and where attorney's secretary and a client witnessed the will, trial court's determination that will was validly executed was not clearly erroneous even though witnesses could not specifically recall seeing testator sign the will. *Green v. Holland*, 9 Ark. App. 233, 657 S.W.2d 572 (1983).

Will which disinherited a party was valid because all of the elements of proper execution were met under subsections (a), (b), and (c) of this section. Also, testamentary capacity was present because when the will was executed the testatrix comprehended the nature and extent of her property and to whom she was giving it. *Foster v. Foster*, 2010 Ark. App. 594, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 742 (Oct. 27, 2010).

#### **Witness to Execution.**

A witness signing testator's name may also attest will. *Bocquin v. Theurer*, 133 Ark. 448, 202 S.W. 845 (1918), superseded

by statute as stated in, *Priola v. Priola*, 237 Ark. 798, 377 S.W.2d 29 (Ark. 1964) (decision under prior law).

#### **Words Following Signature.**

A will's validity is not affected by fact that superfluous or useless words follow a signature. *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880 (1951) (decision under prior law).

Nontestamentary, nondispositive language appearing below the signature of the maker of a will, will not invalidate the instrument. *Clark v. National Bank of Commerce*, 304 Ark. 352, 802 S.W.2d 452 (1991).

Language appearing after signature on will which instructed two persons to dispense with described personal property of testatrix was administrative in nature, and not dispositive, and therefore there was no violation of subsection (b)(5). *Clark v. National Bank of Commerce*, 304 Ark. 352, 802 S.W.2d 452 (1991).

**Cited:** *Ballard v. Beard*, 238 Ark. 459, 382 S.W.2d 593 (1964); *Nowak v. Etchieson*, 241 Ark. 328, 408 S.W.2d 476 (1966); *Warner v. Warner*, 14 Ark. App. 257, 687 S.W.2d 856 (1985); *Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 633 (1999).

### **28-25-104. Holographic wills generally.**

When the entire body of the will and the signature shall be written in the proper handwriting of the testator, the will may be established by the evidence of at least three (3) credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to the will.

**History.** Acts 1949, No. 140, § 20; A.S.A. 1947, § 60-404.

#### **RESEARCH REFERENCES**

**Ark. L. Rev.** Wills — Proof of Testamentary Intent in Holographic Codicils, 25 Ark. L. Rev. 376.

Wills — Validity of Signature for Holographic Wills, 28 Ark. L. Rev. 521.

**U. Ark. Little Rock L. Rev.** Note, Wills

— Holographic Wills and Testamentary Intent — Extrinsic Evidence is Inadmissible to Prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v. Estate of Fountain*, 27 U. Ark. Little Rock L. Rev. 545.

## CASE NOTES

## ANALYSIS

Applicability.  
Animus Testandi.  
Conflict of Laws.  
Effect of Codicils.  
Form of Instruments.  
Instruments Constituting Holographic Wills.  
Instruments Not Constituting Wills.  
Lost or Destroyed Instruments.  
Precedence Over Prior Wills.  
Proof by Beneficiary.  
Signature of Testator.  
Validity.  
Witnesses to Prove Will.

**Applicability.**

This section is not retroactive. *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880 (1951).

**Animus Testandi.**

It is imperative that a holographic instrument asserted as a will should clearly show animus testandi before the instrument is declared by the courts to be a will. *Smith v. Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957).

When evidence supported finding that a holographic will was executed within a fairly short time prior to death of decedent who knew he had a serious coronary condition, it was sufficient to establish that will was testamentary in character and executed with testamentary intent. *Chambers v. Younes*, 240 Ark. 428, 399 S.W.2d 655 (1966).

An alleged holographic will consisting of a sketch on the back of a used envelope and setting forth no words of a dispositive nature was defective on its face because it lacked the required animus testandi, and thus extrinsic evidence was not admissible to prove the necessary intent. *McDonald v. Petty*, 262 Ark. 517, 559 S.W.2d 1 (1977).

**Conflict of Laws.**

Effect to be given to the probate of holographic will in another state in relation to property in this state must be decided in accordance with the laws of this state. *McPherson v. McKay*, 207 Ark. 546, 181 S.W.2d 685 (1944) (decision under prior law).

**Effect of Codicils.**

A typewritten instrument attested by only one witness, but subsequently referred to in a codicil in the handwriting of the testator, was given sufficient validity so that the two instruments were construed together. *Rogers v. Agricola*, 176 Ark. 287, 3 S.W.2d 26 (1928) (decision under prior law).

Holographic will, even if executed as a codicil to a prior will, would be ineffective insofar as there is conflict between the two wills. *McPherson v. McKay*, 207 Ark. 546, 181 S.W.2d 685 (1944) (decision under prior law).

**Form of Instruments.**

A will written and signed by the testator in his own proper handwriting without attesting witnesses is valid. *Ex parte Horner*, 27 Ark. 443 (1872) (decision under prior law).

A letter written by the decedent just before he committed suicide, being wholly in his handwriting and signed by him, in which he directed the disposition of his goods is such a will as may be established by the unimpeachable testimony of three disinterested witnesses as to his handwriting and signature. *Arendt v. Arendt*, 80 Ark. 204, 96 S.W. 982 (1906) (decision under prior law).

**Instruments Constituting Holographic Wills.**

Where disinterested and unimpeachable witnesses testified that will offered for probate was entirely in deceased's handwriting and the instrument stated on its face "this is my last will and testament," and was of testamentary character, it was properly admitted to probate. *Lunsford v. Hawkins*, 203 Ark. 247, 156 S.W.2d 235 (1941) (decision under prior law).

Written and signed instrument addressed to specified church and containing language that "being of sound mind I give to this church for the purpose of educating youth to Christ all my possessions to be disposed or used as the Board of Stewards and the Minister sees fit" was testamentary in character and entitled to be admitted to probate as a holographic will. *Barnard v. Methodist Church*, 226 Ark. 144, 288 S.W.2d 595 (1956).



Probate court erred when it refused to admit a holographic will into probate; although the will did not contain specific testamentary language, the decedent's testamentary intent in the document was shown by the fact that it was captioned "Last Will," the witnesses who signed the document believed it was a will, and the decedent had told her sister that she had a will. *Edmondston v. Estate of Fountain*, 84 Ark. App. 231, 137 S.W.3d 415 (2003), *rev'd*, *Edmundson v. Estate of Fountain*, 358 Ark. 302, 189 S.W.3d 427 (2004).

### **Instruments Not Constituting Wills.**

A statement by a son in an unsigned postscript to a letter written to his father was not a valid holographic will. *Borchers v. Borchers*, 145 Ark. 426, 224 S.W. 729 (1920) (decision under prior law).

A probate court did not err in refusing to admit to probate a handwritten instrument as the holographic will of a decedent where the decedent had not signed the document at the end, where the document made no provision for decedent's wife, and where the document did not dispose of all of his property. *Peevy v. Ritcheson*, 261 Ark. 841, 552 S.W.2d 218 (1977).

### **Lost or Destroyed Instruments.**

In a suit to establish a lost holographic will, the chancellor's finding that the letter offered as a will was not proved, was held not against the preponderance of the evidence. *Sibley v. Patrick*, 180 Ark. 131, 21 S.W.2d 170 (1929) (decision under prior law).

Where, after the testator's death, a holographic will was read to the heirs only and subsequently was wilfully destroyed by one of the heirs, the other heirs, though interested, were, under the circumstances, competent to prove the contents and signature. *Middleton v. Middleton*, 188 Ark. 1022, 68 S.W.2d 1003 (1934) (decision under prior law).

### **Precedence Over Prior Wills.**

A holographic will takes precedence over a prior typewritten will since the enactment of the 1949 Probate Code. *Smith v. Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957).

### **Proof by Beneficiary.**

A beneficiary in a holographic will may testify as to its execution. *Sneed v. Reynolds*, 166 Ark. 581, 266 S.W. 686 (1924) (decision under prior law).

### **Signature of Testator.**

It is not provided, in Probate Code of 1949 that a holographic will has to be signed at end. *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880 (1951).

Where testator's name is written in or upon some part of the will other than at the end thereof, in order to be a valid signature, it must be shown that the testator wrote his name where he did with the intention of authenticating or executing the instrument as his will. *Nelson v. Texarkana Historical Soc'y & Museum*, 257 Ark. 394, 516 S.W.2d 882 (1974).

Where the evidence showed that an instrument was in the handwriting of the testator and that she considered it as her will, it would be sheer speculation to assume that she intended her name in the body of the will to be her signature to it. *Nelson v. Texarkana Historical Soc'y & Museum*, 257 Ark. 394, 516 S.W.2d 882 (1974).

### **Validity.**

Where a decedent's unaltered, handwritten will, which was signed by him and witnessed by one witness, was found to be a holographic will which was valid pursuant to this section, it was not necessary to further test the will's validity as an attested will under § 28-25-103, since a holographic will can satisfy the requirements of both sections. *Huffman v. Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981).

### **Witnesses to Prove Will.**

A witness to the handwriting and signature of an alleged testator is unimpeachable where there is no evidence reflecting on his character or testimony. *Arendt v. Arendt*, 80 Ark. 204, 96 S.W. 982 (1906); *Smith v. Boswell*, 93 Ark. 66, 124 S.W. 264 (1909) (decision under prior law).

An unimpeachable witness is one whom the jury finds to have spoken truthfully and whose conclusion they find to be correct, though there is other evidence tending to contradict him. *Murphy v. Murphy*, 144 Ark. 429, 222 S.W. 721 (1920) (decision under prior law).

In a proceeding to establish a lost holographic will, it is immaterial that the witnesses to the contents and handwriting are interested if there is no question that the document and signature were written by the testator. *Middleton v. Middleton*, 188 Ark. 1022, 68 S.W.2d 1003 (1934) (decision under prior law).



Where in a proceeding to probate a will, a number of witnesses testify that the instrument is in the handwriting of the deceased, and there is nothing in the record to the contrary, they will be regarded as unimpeachable witnesses. *Lunsford v. Hawkins*, 203 Ark. 247, 156 S.W.2d 235 (1941) (decision under prior law).

A credible witness to a holographic will is one who is competent and who is worthy of belief. *Sanders v. Abernathy*, 221 Ark. 407, 253 S.W.2d 351 (1952).

Trial court erred in denying probate of a holographic will on the ground that evidence presented did not meet requirements necessary to establish holographic will where four renters from deceased and two banking officials testified that will

was in handwriting of the deceased. *Sanders v. Abernathy*, 221 Ark. 407, 253 S.W.2d 351 (1952).

Trial court did not err in finding that the requirements of this section had been satisfied because two witnesses, in addition to the grandson who was challenging the codicil, professed sufficient knowledge about decedent's printing and testified that the codicil was written in what appeared to be decedent's handwriting. *Minton v. Minton*, 2010 Ark. App. 310, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 441 (Sept. 23, 2010).

**Cited:** *Odom v. Travelers Ins. Co.*, 174 F. Supp. 426 (W.D. Ark. 1959); *Smith v. MacDonald*, 252 Ark. 931, 481 S.W.2d 741 (1972).

## 28-25-105. Foreign execution.

A will executed outside this state in a manner prescribed by §§ 28-25-101 — 28-25-104 or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution shall have the same force and effect in this state as if executed in this state in compliance with the provisions of §§ 28-25-101 — 28-25-104.

**History.** Acts 1949, No. 140, § 21; A.S.A. 1947, § 60-405.

## CASE NOTES

### ANALYSIS

Applicability.  
Proof of Execution.

### Applicability.

Decedent's holographic will, executed during his residency in Alberta, Canada, was subject to the laws of Arkansas in the ancillary probate proceedings instituted there; hence, the will was subject to the Arkansas law regarding pretermitted children. *Craig v. Carrigo*, 353 Ark. 761, 121 S.W.3d 154 (2003).

### Proof of Execution.

The formality essential to the execution of a will will be tested either by the law of the place of its execution or of the place of the testator's domicile; proof of valid execution, however, is referable to Arkansas' statutes because the proponent seeks to have the will initially probated in this state, and on questions of the burden of proof, the law of the forum governs. *Warner v. Warner*, 14 Ark. App. 257, 687 S.W.2d 856 (1985).

## 28-25-106. Affidavit of attesting witness.

(a) Any attesting witness to a will may make and sign an affidavit before any officer authorized to administer oaths in this state or in any other state stating such facts as he or she would be required to testify to in an uncontested probate proceeding concerning the will.

(b) The attesting witness may make and sign the affidavit at any time, either:

- (1) On his or her own initiative;
- (2) At the request of the testator; or
- (3) After the testator's death, at the request of the executor or of any other person interested.

(c) The affidavit shall be written on the will, or, if that is impracticable, it shall be securely affixed to the will or to a true copy of the will by the officer administering the oath.

(d) If the probate of the will is uncontested, the affidavit may be accepted by the circuit court with the same effect as if the testimony of the witness had been taken before the court.

**History.** Acts 1955, No. 106, § 1; A.S.A. 1947, § 60-417.

### **28-25-107. Incorporation of writing by reference.**

(a) Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

(b)(1) Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities, and property used in trade or business.

(2) To be admissible under this subsection as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him or her and must describe the items and devisees with reasonable certainty.

(3) The writing may be:

(A) Referred to as one to be in existence at the time of the testator's death;

(B) Prepared before or after the execution of the will;

(C) Altered by the testator after its preparation; and

(D) A writing which has no significance apart from its effect upon the dispositions made by the will.

**History.** Acts 1979, No. 814, §§ 3, 4; A.S.A. 1947, §§ 60-418, 60-419.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Wills — Incorporation of Extrinsic Documents by Reference, 6 Ark. L. Rev. 496.

Note, Incorporation by Reference, Integration, and Holographic Wills in *Gifford v. Estate of Gifford*, 46 Ark. L. Rev. 1013.

**U. Ark. Little Rock L.J.** Jans, Survey of Decedents' Estates, 3 U. Ark. Little Rock L.J. 216.



CASE NOTES

**Signed Memoranda.**

Testator’s signed memoranda, made after execution of his will, can be effective with certain restrictions under this section; whether any such memoranda were left by the testator is for the trial court to decide if the issue was disputed. *Deal v. Huddleston*, 288 Ark. 96, 702 S.W.2d 404 (1986).

Memorandum in the handwriting of and signed by the testatrix was incorpo-

rated into her will by reference where it was physically attached and alluded to in the will. *Gifford v. Estate of Gifford*, 305 Ark. 46, 805 S.W.2d 71 (1991).

A signed handwritten note found in the decedent’s jewelry box, which stated, “I want Vernita Ellison to have these items and [my dog],” was properly admitted as part of her will. *Jones v. Ellison*, 70 Ark. App. 162, 15 S.W.3d 710 (2000).

**28-25-108. Deposit of will with court in testator’s lifetime — Disposition.**

(a) **DEPOSIT OF WILL.** A will may be deposited by the person making it, or by some person for him or her, with the circuit court of the county of his or her residence, to be safely kept until delivered or disposed of as provided in this section. On being paid the fee of two dollars (\$2.00), the clerk of the court shall receive and keep the will and give a certificate of deposit for it.

(b) **HOW ENCLOSED.** Every will intended to be deposited as provided in subsection (a) of this section shall be enclosed in a sealed wrapper, which shall have endorsed thereon “Will of,” followed by the name of the testator. The clerk of the court shall endorse thereon the day when and the person by whom it was delivered. The wrapper shall also be endorsed with the name of the person to whom the will is to be delivered after the death of the testator. It shall not be opened or read until delivered to a person entitled to receive it, or otherwise disposed of as provided in this section.

(c) **TO WHOM DELIVERED.**

(1) During the lifetime of the testator, the will shall be delivered only to him or her, or to some person authorized by him or her by an order in writing duly signed by him or her and acknowledged before an officer authorized to administer oaths or attested by the signatures of two (2) persons competent to witness the will.

(2) After the testator’s death, the clerk shall deliver the will to the person named in the endorsement on the wrapper of the will if that person requests the will either in person or in writing.

(3) If the request under subdivision (c)(2) of this section is in person, the clerk shall require proof of identification before delivering the will.

(4) If the request under subdivision (c)(2) of this section is in writing, the clerk shall require an affidavit of the person requesting the will in substantially the following form:

“STATE OF ARKANSAS

COUNTY OF \_\_\_\_\_

BE IT KNOWN THAT on this ....day of ....., ..., before me, the undersigned notary, personally came and appeared:

.....



who after being duly sworn by me, a notary, deposed and stated his or her name and address.

SUBSCRIBED AND SWORN TO BEFORE ME THIS DAY OF .., ..  
.....  
.....

NOTARY PUBLIC”

(d) WHEN WILL TO BE OPENED. -

(1) If the will is not delivered to a person named in the endorsement on the wrapper, it shall be publicly opened in the court within thirty (30) days after notice of the testator’s death, and be retained by the court until offered for probate.

(2) Notice shall be given to the executor, if any, named therein and to such other persons as the court may designate.

(3) If the proper venue is in another court, the will shall be transmitted to that court, but, before such a transmission, a true copy shall be made and retained in the court in which the will was deposited.

**History.** Acts 1949, No. 140, § 31; substituted “The wrapper shall also be  
1983, No. 898, § 2; A.S.A. 1947, §§ 22- endorsed” for “The wrapper may also be  
523, 60-415; Acts 2007, No. 652, § 1. endorsed” in (b); and, in (c), rewrote (2)

**Amendments.** The 2007 amendment and added (3) and (4).

CASE NOTES

**Failure to Fully Comply with Statute.** There was sufficient evidence to establish the validity of a will notwithstanding the fact that all the provisions of this section in handling the will will not necessarily destroy its integrity. *Wargo v. Wargo*, 226 Ark. 42, 287 S.W.2d 882 (1956).

28-25-109. Revocation of wills.

- (a) A will or any part thereof is revoked:
  - (1) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or
  - (2) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the testator’s presence and by the testator’s direction.
- (b) If, after making a will, the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator’s spouse so divorced are revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition, or marital status of the testator, subject, however, to the provisions of § 28-39-401.
- (c) When there has been a partial revocation, reattestation of the remainder of the will shall not be required.

**History.** Acts 1949, No. 140, §§ 22, 23; 1979, No. 814, §§ 1, 2; A.S.A. 1947, §§ 60-406, 60-407.

## RESEARCH REFERENCES

**Ark. L. Rev. Wills** — Dependent Relative Revocation, 8 Ark. L. Rev. 193.

**Wills** — Revocation Implied from Divorce of Testator, 9 Ark. L. Rev. 182.

**Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas**, 39 Ark. L. Rev. 375.

**Recent Development: Arkansas Probate Law** — Revocation of Holographic Wills, 60 Ark. L. Rev. 1023.

**U. Ark. Little Rock L.J.** Jans, Survey

of Decedents' Estates, 3 U. Ark. Little Rock L.J. 216.

**Note, Decedents' Estates — Wills — Doctrine of Dependent Relative Revocation** — May Not Be Applicable in Arkansas, Larrick v. Larrick, 271 Ark. 120, 607 S.W.2d 92 (1980), 4 U. Ark. Little Rock L.J. 353.

**Survey** — Property, 11 U. Ark. Little Rock L.J. 243.

## CASE NOTES

## ANALYSIS

**In General.**

Alterations Not Reexecuted.

Burden of Proof.

Conclusiveness of Court's Finding.

Effect of Divorce.

Equitable Intervention.

Former Spouses.

Holographic Will.

Ineffective Revocation.

Instrument of Revocation.

Intentional Destruction.

Intestacy.

Marriage of Testator.

Obliteration of Will.

Oral Instructions.

Rejection by Spouse.

Residual Legatees.

Will Predating Marriage.

**In General.**

In order to effect revocation of a will other than by execution of another, the revocation must be in a manner prescribed by statute. *Reiter v. Carroll*, 210 Ark. 841, 198 S.W.2d 163 (1946) (decision under prior law).

There is no such thing as an irrevocable will. *Allen v. First Nat'l Bank*, 230 Ark. 201, 321 S.W.2d 750 (1959).

**Alterations Not Reexecuted.**

A testator did not successfully alter her will by retyping all dispositive provisions in her will and destroying the original provisions, since the altered instrument was not reexecuted and reattested to. *Tull v. Benton State Bank*, 257 Ark. 386, 516 S.W.2d 583 (1974).

Where the testator changed the disposition of her property in her typewritten will

by interlineation or obliteration of a devisee's name, her attempt to obliterate the name of the devisee was void since it was not attested, and the devisee's name had to be restored to the will as originally intended. *Dodson v. Walton*, 268 Ark. 431, 597 S.W.2d 814 (1980).

**Burden of Proof.**

The burden to prove revocation of a will rests on party asserting it. *Cook v. Jeffett*, 169 Ark. 62, 272 S.W. 873 (1925) (decision under prior law).

Former statute held not to relieve will contestants from proving the contents of a subsequent will by clear, positive, and satisfactory testimony in order to annul or revoke a former will. *Reed v. Johnson*, 200 Ark. 1075, 143 S.W.2d 32 (1940) (decision under prior law).

**Conclusiveness of Court's Finding.**

The finding of the circuit court, sitting as a jury, as to which is the later of two wills would not be disturbed unless there was a total want of evidence to support it, the dates to the wills not being conclusive. *Austin v. Fielder*, 40 Ark. 144 (1882) (decision under prior law).

**Effect of Divorce.**

Prior to enactment of this section, the only methods of revoking a will were those provided by statute, and a divorce and property settlement to former wife were not facts sufficient to revoke a will. *Mosely v. Mosely*, 217 Ark. 536, 231 S.W.2d 99, 18 A.L.R.2d 695 (1950) (decision under prior law).

The divorced wife of a testator who took her share of their marital property in the divorce proceeding was estopped from tak-



ing advantage of this implied revocation statute after the testator's death to obtain the bulk of her former husband's remaining property on the ground that the marriage was void. *Rickner v. Estate of Rickner*, 283 Ark. 42, 670 S.W.2d 450 (1984).

Will was not revoked by testator's marriage, but divorce did revoke will provisions made in spouse's favor. *Davis v. Aringe*, 292 Ark. 549, 731 S.W.2d 210 (1987).

### **Equitable Intervention.**

Before a case can be made for equitable intervention, there must be proof that the testator undertook acts which would have resulted in legal revocation of the will had he not been prevented from the fulfillment of such acts by force or fraud. *Reiter v. Carroll*, 210 Ark. 841, 198 S.W.2d 163 (1946) (decision under prior law).

### **Former Spouses.**

The clear meaning of the words used in this section is that any bequest to a former spouse is void but that the remainder of the will remains in effect. *McGuire v. McGuire*, 275 Ark. 432, 631 S.W.2d 12 (1982).

This section does not provide that its provision revoking a former spouse's bequest or devise upon divorce is dependent upon testator having made his will during a marriage. *Davis v. Aringe*, 292 Ark. 549, 731 S.W.2d 210 (1987).

Revocation of a holographic will that provided that the decedent's estate would pass to his former wife was appropriate under subsection (b) of this section because the parties' divorce occurred after the execution of the decedent's holographic will and his bequest was revoked by operation of law. *Langston v. Langston*, 371 Ark. 404, 266 S.W.3d 716 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 663 (Dec. 6, 2007).

### **Holographic Will.**

An unattested holographic will held not to revoke a prior attested will. *Parker v. Hill*, 85 Ark. 363, 108 S.W. 208 (1908) (decision under prior law).

Where a holographic will, when found, had the word "void" written at the top of each page and cross marks through the provisions of each page and the testimony of witnesses disagreed as to whether the word "void" and the cross marks were in the testator's handwriting, finding of the

probate court that the will had been intentionally and effectively revoked by the testator was not against the preponderance of the evidence. *Starnes v. Andre*, 243 Ark. 712, 421 S.W.2d 616 (1967).

Trial court clearly erred in finding that a note an executrix found was an effective change of a decedent's individual retirement account beneficiary because if the note was regarded as a holographic will, it was revoked by the express terms of the decedent's will and by operation of law pursuant to subdivision (a)(1) of this section. *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 248 (Mar. 10, 2010), review denied, *Nunnenman v. Grubbs*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 390 (Aug. 6, 2010).

### **Ineffective Revocation.**

Although this section permits revocation of all or part of a will by cancellation or obliteration by the testator with the intent and for the purpose of revoking the will, since the "strike outs" had the effect of increasing the estate, the attempted revocation was ineffective because it would have resulted in a new testamentary disposition without attestation. *Walpole v. Lewis*, 254 Ark. 89, 492 S.W.2d 410 (1973).

### **Instrument of Revocation.**

An instrument to revoke a will must be executed in conformity to statutory requirements. *Newboles v. Newboles*, 169 Ark. 282, 273 S.W. 1026 (1925); *McPherson v. McKay*, 207 Ark. 546, 181 S.W.2d 685 (1944) (decision under prior law).

A will cannot be revoked by a trust instrument under this section. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996).

### **Intentional Destruction.**

Where the widow testified she observed the testator tear up his will and set fire to it about a week before his death and where a witness testified that the testator the day before his death stated that he tore up his old will, there was substantial evidence to support the probate court's finding that the testator intentionally destroyed his will. *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92 (1980).

Testator's will was not revoked pursuant to the terms of this section where the



will was not destroyed in the testator's presence. In re Estate of O'Donnell, 304 Ark. 460, 803 S.W.2d 530 (1991), overruled in part, Edmundson v. Estate of Fountain, 358 Ark. 302, 189 S.W.3d 427 (2004), overruled, Minton v. Minton, 2010 Ark. App. 310, — S.W.3d — (2010).

Decedent's acts of marking "void" over each paragraph of his will, writing "bastard" and "get nothing" on the will, applying Liquid Paper over the names of the beneficiaries, and then shredding the document in the presence of his insurance agents, were sufficient to revoke the will under subdivision (a)(2) of this section. The proponents of the will failed to show that the decedent suffered from insane delusions at the time of the revocation. Heirs of Goza v. Estate of Potts, 2010 Ark. App. 149, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 288 (Mar. 31, 2010).

#### **Intestacy.**

Where a 1973 will was effectively revoked by execution of a 1976 will, in accordance with this section, and the 1976 will was destroyed, the decedent died intestate. Parker v. Mobley, 264 Ark. 805, 577 S.W.2d 583 (1979).

#### **Marriage of Testator.**

A testator's marriage after execution of a will did not operate to revoke his will. Lamb v. Ford, 239 Ark. 339, 389 S.W.2d 419 (1965).

#### **Obliteration of Will.**

A will was not revoked by cross-throughs, interlineations, and mark-outs made by the testator where the changes made by the testator were of no legal significance and evidence did not show that she intended to revoke her will by obliteration. Dillard v. Nix, 345 Ark. 215, 45 S.W.3d 359 (2001).

#### **Oral Instructions.**

Oral instructions by the testator that his will be destroyed were insufficient, even though the testator believed his in-

structions had been carried out. Reiter v. Carroll, 210 Ark. 841, 198 S.W.2d 163 (1946) (decision under prior law).

#### **Rejection by Spouse.**

Where will executed prior to marriage did not provide for widow, widow's right to take against the will was personal to her and did not survive when she died before making election to so take against will. Lamb v. Ford, 239 Ark. 339, 389 S.W.2d 419 (1965).

#### **Residual Legatees.**

Where a husband executed a will giving all of his property to his wife with his stepchildren as the residual legatees and subsequently the parties were divorced, but the will was not changed, the bequest to his former spouse was thereby revoked in accordance with this section and the stepchildren were the proper parties to receive the property under the terms of the will. McGuire v. McGuire, 275 Ark. 432, 631 S.W.2d 12 (1982).

#### **Will Predating Marriage.**

Under this section, any bequest to a former spouse is void, but the remainder of the will remains in effect; and unless the will is completely revoked because all of its substantive provisions favor the decedent's former spouse, the decedent will have died testate and § 28-39-401 will apply. This section does not require a holding that § 28-39-401 was not intended to be applied when the will predates a marriage. In re Estate of Epperson, 284 Ark. 35, 679 S.W.2d 792 (1984), cert. denied, Epperson v. Estate of Epperson, 471 U.S. 1017, 105 S. Ct. 2022 (1985).

This section does not make a distinction concerning wills that predate a marriage and those made after a marriage. Davis v. Arange, 292 Ark. 549, 731 S.W.2d 210 (1987).

**Cited:** Mosely v. Mosely, 217 Ark. 536, 231 S.W.2d 99, 18 A.L.R.2d 695 (1950); Remington v. Roberson, 81 Ark. App. 36, 98 S.W.3d 44 (2003).

### **28-25-110. Revival of revoked or invalid will.**

No will or any part thereof which shall be revoked, or which shall be or become invalid, can be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.

**History.** Acts 1949, No. 140, § 24; A.S.A. 1947, § 60-408.

### CASE NOTES

#### ANALYSIS

Dependent Relative Revocation.  
Destruction of Later Will.

#### **Dependent Relative Revocation.**

This section would seem to preclude the application of the doctrine of dependent relative revocation in Arkansas. *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92 (1980).

#### **Destruction of Later Will.**

The appellant was incorrect that, if a later will was destroyed, then an earlier

will, under which she took, would be revived; a will that has been revoked can only be revived by re-execution or the execution of another will in which the revoked will is incorporated by reference. *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46, 32 S.W.3d 491 (2000).

**Cited:** *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977); *Parker v. Mobley*, 264 Ark. 805, 577 S.W.2d 583 (1979).

## CHAPTER 26

### CONSTRUCTION AND OPERATION

#### SECTION.

- 28-26-101. Construction of will.
- 28-26-102. After-acquired property.
- 28-26-103. Partial intestacy.
- 28-26-104. Failure of a testamentary provision.

#### SECTION.

- 28-26-105. Devise of encumbered property.

### RESEARCH REFERENCES

**ALR.** Effect of testamentary gift to child conditioned upon specified arrangements for parental control. 11 A.L.R.4th 940.

Gift to persons individually named but also described in terms of relationship to testator or another as class gift. 13 A.L.R.4th 978.

Joint and mutual wills. 17 A.L.R.4th 167.

Validity of testamentary exercise of power of appointment by donee sane when will was executed but insane thereafter. 19 A.L.R.4th 1002.

What passes under terms "furniture" or "furnishings" in will. 21 A.L.R.4th 383.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary. 23 A.L.R.4th 369.

Ademption of bequest of debt or balance on debt. 25 A.L.R.4th 88.

Effectiveness of change of named beneficiary of life or accident insurance policy by will. 25 A.L.R.4th 1164.

"Child" or "children" in will as including grandchild or grandchildren. 30 A.L.R.4th 319.

Sufficiency of provision for, or reference to, prospective spouse to avoid lapse or revocation of will by subsequent marriage. 38 A.L.R.4th 117.

Effect of impossibility of performance of condition precedent to testamentary gift. 40 A.L.R.4th 193.

Living wills. 49 A.L.R.4th 812.

**Am. Jur.** 80 Am. Jur. 2d, Wills, § 993 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.



The Devisability of Possibilities of Reverter and Right of Entry for Condition Broken, 7 Ark. L. Rev. 390.

Wills — Designation by Will of Attorney for the Estate, 7 Ark. L. Rev. 419.

C.J.S. 96 C.J.S., Wills, § 819 et seq.

U. Ark. Little Rock L.J. Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

## 28-26-101. Construction of will.

(a) The court in which a will is probated or to which the administration proceeding may have been transferred shall have jurisdiction to construe it at any time during the administration.

(b) The construction may be made on the petition of the personal representative or of any other person interested in the will, or if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of the issue.

(c) When a petition for the construction of a will is filed, notice of the hearing shall be given to persons interested in the construction of the will.

**History.** Acts 1949, No. 140, § 32; A.S.A. 1947, § 60-416.

## CASE NOTES

### ANALYSIS

Children as Class.

Joint Will.

Jurisdiction of Probate Court.

Life Estate.

Limitation Over After Granting of Fee Simple.

Person Interested in the Will.

Reversionary Interests.

Third Persons.

### Children as Class.

Where a will bequeathed money to five grandchildren, children of his predeceased daughter, the six children of the daughter took as a class, as the testator expressed his intention to include all the children of his daughter and the number "five" was disregarded. *Walker v. Case*, 211 Ark. 1091, 204 S.W.2d 543, 173 A.L.R. 1009 (1947) (decision under prior law).

### Joint Will.

There can be no such thing as a joint will to take effect upon the death of the survivor. *Hershy v. Clark*, 35 Ark. 17 (1879) (decision under prior law).

### Jurisdiction of Probate Court.

Where a will provided for a trust under supervision of the chancery court which assumed administration of the trust, the probate court had jurisdiction to determine whether a bequest under the will was payable, since it was concerned with administration of the estate, but it did not have jurisdiction to determine whether a petitioner had the right to rents and possession of trust lands, since that involved administration of the trust under supervision of the chancery court. *Cross v. McLaren*, 223 Ark. 674, 267 S.W.2d 956 (1954).

Where a widow elected to take against the will, posing the question of whether such action accelerated the vesting of the estates of the remaindermen, the probate court had jurisdiction to construe the will. *Harrison v. Harrison*, 234 Ark. 271, 351 S.W.2d 441 (1961).

### Life Estate.

Where testator gave his wife a life interest in his real property with the remainder in his children, with the condi-



tion she could sell the property as necessary to be maintained and supported in the standard of living to which she was accustomed, she had the right to sell the real property to obtain sufficient funds to continue that standard, assuming she first gave the testator's children the option to purchase the property, as also required by the will. *Green v. Ware*, 305 Ark. 224, 807 S.W.2d 24 (1991).

### **Limitation Over After Granting of Fee Simple.**

Where testator devised his residuary estate to his widow "in fee simple forever" and in the next sentence of his will attempted to provide for the distribution of any other property that the widow had not disposed of during her lifetime or by her will, the limitation over was void, being inconsistent with the fee simple devise to the widow, but even so the court was not called upon to determine the validity of the latter paragraph, for a decision of that issue was not essential to a distribution of the estate, the distribution order contemplating the conclusive settlement in adversary proceeding, and the only issue that could be determined upon the filing of the final account was a proper physical distribution; even if the latter paragraph had been valid, it could not have been known at that time what property would be left undisposed of or what persons would then prove to be heirs later on. Therefore, the widow correctly interpreted the law in stating that she was the sole beneficiary of the estate. *Collie v.*

*Tucker*, 229 Ark. 606, 317 S.W.2d 137 (1958).

### **Person Interested in the Will.**

A co-executor cannot request a construction of the will solely in his capacity as an executor because his status as a fiduciary is wholly dependent upon his position as co-executor, and, as such, he would not be an "interested person" as used in this section. *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997).

### **Reversionary Interests.**

Where statute provides that testator may devise realty and all his interest therein, he thus may also devise his possibility of reverter. *Fletcher v. Ferrill*, 216 Ark. 583, 227 S.W.2d 448, 16 A.L.R.2d 1240 (1950) (decision under prior law).

Where a deed reserved a life estate in grantor and contained reverter clause "to the heirs of the said" grantor, these words were words of limitation and not of purchase; therefore, upon lapse of condition after death of grantor, the real estate reverted to the estate of the grantor, to be distributed according to the will. *Fletcher v. Ferrill*, 216 Ark. 583, 227 S.W.2d 448, 16 A.L.R.2d 1240 (1950) (decision under prior law).

### **Third Persons.**

A clause added by third person may be disregarded. *Musgrove v. Holt*, 153 Ark. 355, 240 S.W. 1068 (1922) (decision under prior law).

**Cited:** *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980).

## **28-26-102. After-acquired property.**

Property acquired by the testator after the making of the testator's will shall pass as if title to the property was vested in the testator at the time of making the will, unless the contrary intention manifestly appears in the will.

**History.** Acts 1949, No. 140, § 25; A.S.A. 1947, § 60-409.

## **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Jans, Survey of Decedents' Estates, 3 U. Ark. Little Rock L.J. 216.

CASE NOTES

**Cited:** *Binns v. Vick*, 260 Ark. 111, 538 S.W.2d 283 (1976).

**28-26-103. Partial intestacy.**

If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided by law with respect to the estates of intestates.

**History.** Acts 1949, No. 140, § 27; A.S.A. 1947, § 60-411.

RESEARCH REFERENCES

**Ark. L. Rev.** The Doctrine of Worthier Title in Arkansas, 21 Ark. L. Rev. 394.

CASE NOTES

ANALYSIS

Exclusionary Clause.  
Properties Not Devised.

**Exclusionary Clause.**

An exclusionary clause in a will lacking a residuary clause does not control intestate property held by the testatrix. *Cook v. Estate of Seeman*, 314 Ark. 1, 858 S.W.2d 114 (1993).

Because intestate property passes by law rather than by will, the statute and not the testator controls the distribution of intestate property; therefore, although the testator's intent to disinherit is clearly and unambiguously expressed in a will, such exclusionary language will not be given effect as against the distribution of intestate property. *Cook v. Estate of Seeman*, 314 Ark. 1, 858 S.W.2d 114 (1993).

Despite the fact that several beneficiaries were explicitly disinherited by the

provisions of a will, the residue of the estate was distributed according to the rules of intestate succession because the residuary clause was ineffective; the presumption against partial intestacy was subordinate to the presumption against disinheritance. *Harrison v. Harrison*, 82 Ark. App. 521, 120 S.W.3d 144 (2003).

**Properties Not Devised.**

Where testator's will consisted of six separate sheets of holographic writings, five of which made specific devises to named relatives, while on the sixth sheet he devised to his nieces and nephews not otherwise named "all the rest of my property" and then without punctuation described thereon specific property and "rest of money after funeral expenses," the sixth sheet did not constitute a devise of after-acquired properties and testator died intestate as to such after-acquired properties. *Bradshaw v. Pennington*, 225 Ark. 410, 283 S.W.2d 351 (1955).

**28-26-104. Failure of a testamentary provision.**

Unless a contrary intent is indicated by the terms of the will, the following rules shall apply:

(1) Except as provided in subdivision (2) of this section:

(A) If a devise other than a residuary devise fails for any reason, it becomes a part of the residue; and

(B) If the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his or



her share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue; and

(2) Whenever property is devised to a child, natural or adopted, or other descendant of the testator, either by specific provision or as a member of a class, and the devisee shall die in the lifetime of the testator, leaving a child, natural or adopted, or other descendant who survives the testator, the devise shall not lapse, but the property shall vest in the surviving child or other descendant of the devisee, as if the devisee had survived the testator and died intestate.

**History.** Acts 1949, No. 140, § 26; 1979, No. 813, § 1; A.S.A. 1947, § 60-410.

### RESEARCH REFERENCES

**Ark. L. Rev.** Descent in Absence of Kin — Escheat, 13 Ark. L. Rev. 350.

The Doctrine of Worthier Title in Arkansas, 21 Ark. L. Rev. 394.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Case Note, *Cox v. Whitten: Limiting the Inheritance Rights of Adopted Adults, etc.*, 40 Ark. L. Rev. 627.

**U. Ark. Little Rock L.J.** Jans, Survey of Decedents' Estates, 3 U. Ark. Little Rock L.J. 216.

Survey of Arkansas Law, Decedents' Estates, 5 U. Ark. Little Rock L.J. 135.

### CASE NOTES

#### ANALYSIS

Adopted Children.

Death of Legatee or Devisee Prior to Testator.

Distributive Gift.

Lapsed Legacy.

Life Estate.

#### Adopted Children.

Adopted children of predeceased legatee were held to be within statutory provisions. *Dean v. Smith*, 195 Ark. 614, 113 S.W.2d 485 (1938) (decision under prior law).

#### Death of Legatee or Devisee Prior to Testator.

A legacy or devise lapses when the legatee or devisee dies before the testator with the exception of where the legacy or devise is to the child or other descendant of the testator. *Christy v. Smith*, 226 Ark. 289, 289 S.W.2d 885 (1956).

Where the legatee or devisee dies before the testator, the legacy or devise lapses unless the beneficiary is a child or other descendant of the testator or where it is a

gift to a class. *Scholem v. Long*, 246 Ark. 786, 439 S.W.2d 929 (1969).

Where the residuary clause of the will of a testator left all property to a brother who survived testator and to a sister who predeceased testator, the bequest of one-half of the residuum to the sister lapsed and the bequest passed as intestate property to be distributed to the heirs-at-law of the testator. *Eckert Heirs v. Harlow*, 251 Ark. 1018, 476 S.W.2d 244 (1972).

#### Distributive Gift.

A devise of land to three cousins of testator who were described by name and not by relationship was a distributive gift to individuals rather than a gift to a class, and the gift lapsed as to one of the cousins when his death preceded the death of the testator, notwithstanding a clause in the will providing that the devisees were not to sell or mortgage the property for 20 years after death of testator. *Scholem v. Long*, 246 Ark. 786, 439 S.W.2d 929 (1969).

#### Lapsed Legacy.

A legacy or devise to one not a descendant of the testator lapses when the lega-



tee or devisee dies before the testator and becomes part of the residuary estate passing under the clause of the will disposing of the residuum. *Gibbons v. Ward*, 115 Ark. 184, 171 S.W. 90 (1914) (decision under prior law).

#### Life Estate.

A devise to A for life, with remainder to B, does not lapse by the death of A in the

lifetime of the testator, but vests immediately in B on the death of the testator. *West v. Williams*, 15 Ark. 682 (1855) (decision under prior law).

**Cited:** *Welch v. Tarver*, 256 Ark. 272, 507 S.W.2d 505 (1974); *Jones v. Bransford*, 270 Ark. 664, 606 S.W.2d 118 (Ct. App. 1980).

### 28-26-105. Devise of encumbered property.

A valid charge or encumbrance upon any property shall not revoke any provision of a previously executed will relating to the same property. However, the devisee shall take the property subject to the charge or encumbrance, the discharge of which will be governed by the provisions of § 28-53-113.

**History.** Acts 1949, No. 140, § 29; A.S.A. 1947, § 60-413.

## CHAPTER 27

### UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

#### SECTION.

28-27-101. Testamentary additions to trusts.

28-27-102. Effect on existing wills.

28-27-103. Uniformity of application and construction.

#### SECTION.

28-27-104. Short title.

28-27-105. Savings clause.

28-27-106. Effective date.

**Publisher's Notes.** Former chapter 27, concerning uniform testamentary additions to trusts, was repealed by implication by Acts 1995, No. 751, §§ 1-6. The former chapter was derived from the following sources:

28-27-101. Acts 1963, No. 483, § 1; 1971, No. 320, § 1; A.S.A. 1947, § 60-601.

28-27-102. Acts 1963, No. 483, § 2; A.S.A. 1947, § 60-602.

28-27-103. Acts 1963, No. 483, § 3; A.S.A. 1947, § 60-603.

28-27-104. Acts 1963, No. 483, § 4; A.S.A. 1947, § 60-604.

28-27-105. Acts 1963, No. 483, § 5; A.S.A. 1947, § 60-604n.

For Comments regarding the Uniform Testamentary Additions to Trusts Act, see Commentaries Volume B.

**Effective Dates.** Acts 1995, No. 751, § 6: August 1, 1995.

### RESEARCH REFERENCES

**Am. Jur.** 79 Am. Jur. 2d, Wills, § 196.

**Ark. L. Rev.** The Developing Use of the Revocable Trust and Pour-Over Wills — Some Functional Problems During the Executorial Period, 21 Ark. L. Rev. 499.

Workbook for Arkansas Estate Planners, 22 Ark. L. Rev. 408.

**C.J.S.** 97 C.J.S., Wills, § 1425 et seq.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the

Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

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### 28-27-101. Testamentary additions to trusts.

(a) A will may validly devise or bequeath property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise or bequest is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(b) Unless the testator's will provides otherwise, property devised or bequeathed to a trust described in subsection (a) is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised or bequeathed, and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise or bequest to lapse.

**History.** Acts 1995, No. 751, § 1.

### RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.      **kansas Trust Code:** Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.  
**U. Ark. Little Rock L. Rev.** The Ar-

### CASE NOTES

**Cited:** Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 (2001).

### 28-27-102. Effect on existing wills.

This chapter applies to a will of a testator who dies after July 31, 1995.

**History.** Acts 1995, No. 751, § 2.

### **28-27-103. Uniformity of application and construction.**

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

**History.** Acts 1995, No. 751, § 3.

### **28-27-104. Short title.**

This chapter may be cited as the “Uniform Testamentary Additions to Trusts Act of 1995.”

**History.** Acts 1995, No. 751, § 4.

### **28-27-105. Savings clause.**

The repeal of any statutory provision by this chapter does not impair, or otherwise affect, any will, devise, or bequest or any trust existing on August 1, 1995, nor does the repeal of any statutory provision by this chapter impair any contract or affect any right accrued before August 1, 1995.

**History.** Acts 1995, No. 751, § 5.

### **28-27-106. Effective date.**

This chapter takes effect on August 1, 1995.

**History.** Acts 1995, No. 751, § 6.

## **CHAPTERS 28-37**

[Reserved]

## ***SUBTITLE 4. ADMINISTRATION OF DECEDENTS’ ESTATES***

### **CHAPTER 38**

## **GENERAL PROVISIONS**

#### **SECTION.**

**28-38-101. Joint income tax refunds.**

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**Effective Dates.** Acts 1965, No. 381, § 4; Mar. 19, 1965. Emergency clause provided: “It has been found and is declared by the General Assembly that the Internal

Revenue Service of the United States Treasury Department draws checks or warrants in payment of refunds of federal income tax in favor of and in the names of



both spouses with respect to whom joint federal income tax returns have been filed irrespective of the fact of death of one of such spouses and further will not honor such a check or warrant indorsed by the survivor only in the absence of an appropriate court order; that this procedure works a great hardship on survivors, especially in cases where there is no admin-

istration on the estate of the deceased spouse; and that enactment of this measure will enable survivors to receive the refunds due them with reasonable expedition. Therefore, an emergency is declared to exist, and this Act, being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

## 28-38-101. Joint income tax refunds.

(a) The survivor of spouses with respect to whom a joint federal income tax return has been filed, upon the death of the other, shall be entitled to receive any refund of tax due from the Internal Revenue Service in his or her own right upon making proof of the death of the other.

(b) Proof of death for the purpose of this section may be made by exhibiting a death certificate of a coroner, licensed physician, or appropriate state agency, or by affidavit of the survivor.

(c) It shall be unnecessary for a survivor who has complied with the terms of this section to secure any court order to entitle him or her to receive the federal income tax refund, but he or she shall have a right to a United States Treasury check or warrant for the refund drawn in his or her favor solely.

**History.** Acts 1965, No. 381, §§ 1-3; A.S.A. 1947, §§ 62-2131 — 62-2133.

## CASE NOTES

### In General.

This section contemplates the situation where an income tax return is filed while both husband and wife are still living and thereafter one of them dies, not the situ-

ation where one spouse has already died when the return is filed. *Foster v. Schmiedeskamp*, 260 Ark. 898, 545 S.W.2d 624 (1977).

## CHAPTER 39

## RIGHTS OF SURVIVING FAMILY MEMBERS

### SUBCHAPTER.

1. ALLOWANCES TO FAMILY.
2. HOMESTEAD RIGHTS.
3. ASSIGNMENT OF DOWER AND CURTESY.
4. TAKING AGAINST THE WILL.

### SUBCHAPTER 1 — ALLOWANCES TO FAMILY

#### SECTION.

28-39-101. Allowances to surviving spouse and minor children.

#### SECTION.

28-39-102. Right of surviving spouse to live in house for two months — Sustenance.

## SECTION.

28-39-103. Extension of surviving spouse's quarantine.

28-39-104. Allowance paid surviving spouse out of rent until ap-

## SECTION.

portionment of curtesy or dower.

28-39-105. Advancements to minor distributees.

**Cross References.** Life interests and remainders, determination of present value, § 18-2-101 et seq.

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

## RESEARCH REFERENCES

**ALR.** Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse. 31 A.L.R.4th 1190.

Rights of inheritance as between kindred of whole and half blood. 47 A.L.R.4th 561.

**Am. Jur.** 23 Am. Jur. 2d, Desc. & D., § 109 et seq.

31 Am. Jur. 2d, Exec. & Ad., § 324 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Probate Code Amendments, 5 Ark. L. Rev. 377.

Federal Estate Tax: Surviving Spouse Support Allowances and the Marital Deduction, 21 Ark. L. Rev. 131.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Estate Planning with Disclaimers in Arkansas, 27 Ark. L. Rev. 411.

**C.J.S.** 26B C.J.S., Desc. & D., § 23 et seq.

34 C.J.S., Exec. & Ad., § 344 et seq.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

Note, Constitutional Law — Equal Protection — Arkansas' Gender-Based Statutes on Dower, Election, Statutory Allowances, and Homestead Are Unconstitutional, Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981); Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), 4 U. Ark. Little Rock L.J. 361.

Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.

Survey of Arkansas Law, Decedents' Estates, 5 U. Ark. Little Rock L.J. 135.



Averill & Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. Ark. Little Rock L.J. 631.

### **28-39-101. Allowances to surviving spouse and minor children.**

(a)(1) In addition to their homestead, dower, and curtesy rights, the surviving spouse and minor children of a decedent, or either in the absence of the other, shall be entitled to have assigned to them out of the property owned by the decedent at the time of his or her death, personal property, tangible or intangible, to be selected prior to the sale thereof by the personal representative or after sale out of the proceeds thereof by the surviving spouse, if there is a surviving spouse or, otherwise, by the guardian of the minor children, when the personal property is of the value of four thousand dollars (\$4,000) as against distributees or the value of two thousand dollars (\$2,000) as against creditors.

(2) The right to such an allowance shall vest in the surviving spouse upon the death of his or her spouse, shall not terminate with his or her subsequent death or remarriage, and shall become his or her absolute property or the property of his or her estate upon death without restriction as to use, encumbrance, or disposition.

(3) If any of the minor children are not children of the surviving spouse, the allowance shall vest in the surviving spouse to the extent of one-half ( $\frac{1}{2}$ ) thereof, and the remainder shall vest in the decedent's minor children in equal shares.

(b) Such furniture, furnishings, appliances, implements, and equipment as shall be reasonably necessary for the family use and occupancy of his or her dwelling shall be assigned to and vested in the surviving spouse, if any, provided he or she was living with the decedent at the time of his or her death.

(c) During a period of two (2) months after the death of the decedent, the surviving spouse and minor children, or either in the absence of the other, shall be entitled to receive from the estate such reasonable amount, not exceeding in the aggregate one thousand dollars (\$1,000), as in the judgment of the court may be required for their sustenance, in accordance with the usual living standards of the family.

(d) The provisions of subsections (a)-(c) of this section shall be cumulative, and the provisions of subsections (b) and (c) of this section shall apply as against creditors and distributees.

**History.** Acts 1949, No. 140, § 108; 1981, No. 714, § 68; A.S.A. 1947, § 62-1951, No. 255, § 10; 1967, No. 287, § 8; 2501; Acts 2003, No. 177, §§ 1, 2.



## RESEARCH REFERENCES

**Ark. L. Rev.** Comment, Arkansas Marriage: A Partnership Between a Husband

and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

## CASE NOTES

## ANALYSIS

Constitutionality.

Purpose.

Applicability.

Alternative Money Judgment.

Appraisement for Administrator.

Effect of Court Orders.

Equity Interest.

Estate Taxes.

Estimating of Interest.

Inventory of Property.

Jurisdiction.

Late Claims.

Marriage Settlement.

Minors' Interests.

Nature of Allowances.

Notice to Heirs.

Partnership Property.

Personalty Only Vested.

Proceeds from Sale of Assets.

Proceeds from Sale of Realty.

Renunciation of Will.

Request for Appraisement.

Right to Allowances.

Soil Conservation Subsidy.

Vesting of Estate.

Wrongful Death at Hands of Spouse.

**Constitutionality.**

The portion of this section which conferred dower rights upon a widow, but did not confer such rights upon a surviving husband was a gender based statute which did not serve an important governmental function and thus was unconstitutional, since it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision under prior law).

Where widow of decedent elected to take against the will and petitioned for statutory allowances under this section, which provided allowances of \$2,000.00 plus \$500.00 sustenance to a widow, but not a widower, there was no way under the facts of the case and the statutory language to extend benefits to the disfa-

vored class, and thus benefits had to be denied to both widowers and widows by declaring this section unconstitutional as applied. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981) (decision under prior law).

A devisee and beneficiary of a decedent's will who was not an heir and who stood to lose financially if the decedent's wife claimed against the will pursuant to § 28-39-401 and received statutory allowances provided for in this section, had standing to challenge the constitutionality of both statutes since the test was whether the party would lose financially unless the issue was raised. *Huffman v. Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981) (decision under prior law).

**Purpose.**

The legislature intended to make a statutory allowance for the joint use of the widow and minor children, regardless of the claims of creditors against the estate, and the statute of descent and distribution, therefore, does not apply to such an allowance. *Moudy v. Bradley*, 200 Ark. 630, 140 S.W.2d 113 (1940) (decision under prior law).

**Applicability.**

Act 714 of 1981, which created gender neutral awards of dower and curtesy under § 28-39-401 and allowances under this section, is substantive rather than procedural and therefore should not be applied retroactively. *Huffman v. Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981); *Hall v. Hall*, 274 Ark. 266, 623 S.W.2d 833 (1981), cert. denied, 456 U.S. 916, 102 S. Ct. 1770 (1982).

**Alternative Money Judgment.**

It is improper to enter an alternative money judgment against an administrator unless it is shown that the specific articles are not in the hands of the administrator at the time the judgment is rendered. *Cash v. Cash*, 67 Ark. 278, 54 S.W. 744 (1899) (decision under prior law).

**Appraisement for Administrator.**

The allowance to the widow of specific articles of her husband's estate, not exceeding \$150 in value, based upon the appraisement made for the administrator, instead of upon an appraisement made at the instance of the widow, was an irregularity merely and not prejudicial to the administrator. *Cash v. Cash*, 67 Ark. 278, 54 S.W. 744 (1899) (decision under prior law).

**Effect of Court Orders.**

Although a court did not order an estate vested in a widow, in a proceeding to compel her to account, she could show the value and avail herself of statutory benefits. *Hampton v. Physick*, 24 Ark. (11 Barber) 561 (1867) (decision under prior law).

An order of the probate court allowing administrator to pay to herself, as widow of the decedent, statutory allowances and in addition one-third of all personal property and one-third of the cash in a bank did not assume the force of a judgment which was affected, in any way, by a nunc pro tunc order. *Moudy v. Bradley*, 200 Ark. 630, 140 S.W.2d 113 (1940) (decision under prior law).

**Equity Interest.**

Where there was evidence to indicate that the estate may have included equity in an automobile, since the decedent had purchased the property, the administrator should have proceeded to pay for it from the assets of the estate, sold it as provided in § 28-49-107, obtained authority to abandon it as permitted under § 28-49-106, or applied to the court for assignment of it to her as part of her statutory allowance under this section, as she was accountable for it, either by accounting under the Probate Code or for conversion under § 28-49-105. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**Estate Taxes.**

Estate taxes, under the provisions of § 26-59-115 [repealed], were to be deducted from the property belonging to the widow as dower and allowance and as surviving tenant of the estate by the entirety as well as from the other assets. *Terral v. Terral*, 212 Ark. 221, 205 S.W.2d 198 (1947) (decision under prior law).

**Estimating of Interest.**

In estimating the amount of a widow's dower in personalty, the whole personal

estate must be taken into consideration, including property taken under statutory provisions for special allowances. *Sharp v. Himes*, 129 Ark. 327, 196 S.W. 131 (1917) (decision under prior law).

**Inventory of Property.**

Although the administrator asserted that the only personal property of the estate was household furnishings, title to which vested in her under this section, without an inventory the court was in no position to determine whether all of the items claimed fell within the purview of allowances to the widow and minor children in order to make an appropriate assignment to them. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**Jurisdiction.**

The probate court did not have jurisdiction to order payment of a statutory allowance from a bank account held in the name of the decedent or her son, who died a few months after the death of the decedent, as the wife and son of the decedent's son, who claimed the bank account, were strangers to the estate. *Smith v. Smith*, 338 Ark. 526, 998 S.W.2d 745 (1999).

**Late Claims.**

A claim for widow's allowances filed more than 12 years after an administrator was appointed and nearly five months after the administrator's death, long after all personal estate had been used to pay debts and claims, was properly denied. *Walls v. Phillips*, 204 Ark. 365, 162 S.W.2d 59 (1942) (decision under prior law).

Where a husband disposed of all of his property by will without mention as to his widow's statutory allowances, the widow was entitled to these allowances, but where she did not ask for them while the executor had in his hands money to pay them and permitted him to expend the money in the payment of debts and expenses of administration, she was entitled only to such sum as the executor had on hand. *Wofford v. James*, 204 Ark. 700, 163 S.W.2d 710 (1942) (decision under prior law).

**Marriage Settlement.**

Although a marriage settlement was made in lieu of dower and homestead rights, it did not require a widow to waive her statutory rights, and she was entitled to both these allowances and their value.



Masterson v. Masterson, 200 Ark. 193, 139 S.W.2d 30 (1940) (decision under prior law).

### **Minors' Interests.**

Former statute did not require the appointment of a guardian for minor children to protect their interest in the allowance. Young v. Lowe, 148 Ark. 129, 229 S.W. 4 (1921) (decision under prior law).

Where there is a widow and a minor child and the widow does not have the care and custody of the child and is not its guardian, the widow and child are to share equally in the allowance and she cannot appropriate it to her own use to the exclusion of the minor. Moudy v. Bradley, 200 Ark. 630, 140 S.W.2d 113 (1940) (decision under prior law).

### **Nature of Allowances.**

Allowances to a widow are in addition to dower. Ex parte Grooms, 102 Ark. 322, 143 S.W. 1063 (1912); Sharp v. Himes, 129 Ark. 327, 196 S.W. 131 (1917); Costen v. Fricke, 169 Ark. 572, 276 S.W. 579 (1925) (decision under prior law).

Statutory allowances held personal to the widow. Walls v. Phillips, 204 Ark. 365, 162 S.W.2d 59 (1942) (decision under prior law).

Statutory allowance of \$1,000 (now \$2,000) to surviving spouse held personal and for her benefit and therefore would not pass to her heirs, even though she was insane, from her husband's death until her own. Jeffcoat v. Harper, 224 Ark. 778, 276 S.W.2d 429 (1955) (decision under prior law).

### **Notice to Heirs.**

The proceeding of a probate court to declare the estate in a widow is "in rem", and notice to the heirs is not necessary. Harrison v. Lamar, 33 Ark. 824 (1878) (decision under prior law).

### **Partnership Property.**

Former statute operated only on the personal property of a deceased, and so the widow of a member of the insolvent partnership was not entitled to statutory allowance out of the personal property of the partnership. McLerkin v. Schilling, 192 Ark. 1083, 96 S.W.2d 445 (1936) (decision under prior law).

### **Personalty Only Vested.**

Value of personal estate only is to be considered in determining whether it may

be vested in a widow or minor children. Wilson v. Massie, 70 Ark. 25, 65 S.W. 942 (1901) (decision under prior law).

An order of a probate court vesting land of a decedent, of value less than \$300, in the widow was void. Calhoun v. Moore, 79 Ark. 109, 94 S.W. 931 (1906) (decision under prior law).

The allowance must be made out of the personal property and not from proceeds of real estate. Kitchens v. Jones, 87 Ark. 502, 113 S.W. 29 (1908) (decision under prior law).

### **Proceeds from Sale of Assets.**

A widow was not barred from having the proceeds of a sale of husband's estate vested in her because of failure to have the estate appraised and make a claim for allowance before the sale. Henry v. Tillar, 70 Ark. 246, 67 S.W. 310 (1902) (decision under prior law).

### **Proceeds from Sale of Realty.**

Where testator's property at death consisted of both personalty and realty, the will directed that the realty be sold and converted into cash, and the widow elected to take against the will and consented to the sale of the realty, the widow's allowance was limited to \$1,000 (now \$2,000), or the value of the personalty, whichever is the lesser. Atkinson v. Van Echaute, 236 Ark. 423, 366 S.W.2d 273 (1963) (decision under prior law).

### **Renunciation of Will.**

Where a widow elects to take under law, and not under will, she takes as though husband had died intestate, without will, and she is entitled to dower, homestead, and other allowances. Jameson v. Jameson, 117 Ark. 142, 173 S.W. 851 (1915); Cypert v. McEuen, 172 Ark. 437, 288 S.W. 923 (1926) (decision under prior law).

Where a testator left only homestead and less than \$300 in personal property and widow timely renounced the will and elected to take under a former statute, unappealed order of the probate court, having the effect of setting aside the realty to her and infant child as their homestead, entitled the widow to possession of the homestead even after her remarriage, though the will provided that, in such event, the property should go to the children. Lauck v. Burnett, 192 Ark. 547, 93 S.W.2d 129 (1936) (decision under prior law).



**Request for Appraisement.**

A widow lost no right and was not barred from having proceeds of the sale of the husband's estate vested in her because of the failure to have appraisement made in 30 days or at all. *Wilson v. Massie*, 70 Ark. 25, 65 S.W. 942 (1901) (decision under prior law).

**Right to Allowances.**

A widow was entitled to the articles specified unconditionally and against the rights of heirs and creditors. *Hill's Adm'r's v. Mitchell*, 5 Ark. (5 Pike) 608 (1844) (decision under prior law).

A widow's right to statutory allowances is not dependent upon her possession of any property of the estate. *Lambert v. Tucker*, 83 Ark. 416, 104 S.W. 131 (1907) (decision under prior law).

A widow who has elected to take under her husband's will is nevertheless entitled to take statutory allowances. *Cypert v. McEuen*, 172 Ark. 437, 288 S.W. 923 (1926); *McEachin v. People's Nat'l Bank*, 191 Ark. 544, 87 S.W.2d 12 (1935) (decision under prior law).

A probate court properly allowed to a widow one-third of the intestate's personal estate as well as a \$300 allowance. *Miller v. Oil City Iron Works*, 184 Ark. 900, 45 S.W.2d 36 (1931) (decision under prior law).

A receipt signed by a widow for \$100 paid to her by the testator upon execution of deeds to children did not affect the widow's right to statutory allowances. *Spears v. Spears*, 213 Ark. 15, 209 S.W.2d 105 (1948) (decision under prior law).

A widow's allowances are not extinguished by a release of dower and homestead rights. *Spears v. Spears*, 213 Ark. 15, 209 S.W.2d 105 (1948) (decision under prior law).

A widow is entitled to allowances under subsection (b) of this section although she also receives allowances under subsections (a) and (c). *Horn v. Horn*, 228 Ark. 948, 311 S.W.2d 311 (1958).

A widow was entitled to support of \$500 (now \$1,000), statutory allowance of \$1,000 (now \$4,000) and household goods

as against distributees although she would have only been entitled to statutory allowance of \$500 (now \$2,000) as against complaining creditor. *Wilson v. Davis*, 239 Ark. 305, 389 S.W.2d 442 (1965) (decision under prior law).

**Soil Conservation Subsidy.**

A widow, either as such or as executor of her husband's estate, was not entitled to payment of subsidy under Soil Conservation Act that had been properly assigned by her husband. *Oldham v. Wright*, 202 Ark. 1049, 155 S.W.2d 50 (1941) (decision under prior law).

**Vesting of Estate.**

The law vests an estate. *Harrison v. Lamar*, 33 Ark. 824 (1878) (decision under prior law).

When an estate was less than \$300, it vested in the widow and minor children and was exempt from administration proceedings. *Bertig v. Higgins*, 89 Ark. 70, 115 S.W. 935 (1909) (decision under prior law).

An estate which did not exceed \$300 in value vested absolutely in a widow and children free from creditor's claims. *Jerry v. Sturdivant*, 136 Ark. 624, 203 S.W. 694 (1918) (decision under prior law).

**Wrongful Death at Hands of Spouse.**

Section 28-11-204, which provides that when one spouse kills the other and is convicted of murder the spouse convicted shall not be "endowed" in the estate of the decedent, is intended to apply only to dower and curtesy and does not apply to a claim for a widow's statutory allowance under such circumstances. However, apart from such statute, the principle that one who wrongfully kills another will not be permitted to share in the other's estate or otherwise profit from the crime will apply to such a situation. *Smith v. Dean*, 226 Ark. 438, 290 S.W.2d 439 (1956), overruled, *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (Ark. 1999).

**Cited:** *Robinson v. Shivley*, 234 Ark. 222, 351 S.W.2d 449 (1961); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975); *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980).

## 28-39-102. Right of surviving spouse to live in house for two months — Sustenance.

A surviving spouse may reside in the chief residence of the deceased spouse for two (2) months after death, whether or not dower or curtesy is assigned sooner, without being liable for any rent. In the meantime, the surviving spouse shall have a reasonable sustenance out of the estate of the deceased spouse.

**History.** Rev. Stat., ch. 52, § 17; C. & M. Dig., § 3530; Pope's Dig., § 4415; Acts 1981, No. 714, § 69; A.S.A. 1947, § 62-2501.1.

## 28-39-103. Extension of surviving spouse's quarantine.

If the dower or curtesy of any surviving spouse is not assigned and laid off within two (2) months after the death of a deceased spouse, the surviving spouse shall remain in and possess the chief residence of the deceased spouse, together with the land thereto attached, free of all rent, until dower or curtesy shall be laid off and assigned to the surviving spouse.

**History.** Rev. Stat., ch. 52, § 18; C. & M. Dig., § 3531; Pope's Dig., § 4416; Acts 1981, No. 714, § 70; A.S.A. 1947, § 62-2501.2.

### CASE NOTES

#### ANALYSIS

In General.

Nature of Privilege.

Possession Through Tenants.

Rental or Commercial Property.

Rights to Rents.

Waiver.

#### In General.

A widow is entitled to continue in possession of the mansion-house until her dower is assigned, though she is the administrator and the heir is a minor. *Trimble v. James*, 40 Ark. 393 (1883).

#### Nature of Privilege.

A widow's right to hold the intestate's dwelling house and farm attached until assignment of dower is a personal privilege, not an estate in land, and cannot be transferred to another. *Flowers v. Flowers*, 84 Ark. 557, 106 S.W. 949 (1907).

#### Possession Through Tenants.

A widow may occupy the homestead of her deceased husband until dower is assigned to her, and she may hold this possession through tenants and receive the rents. *Jarrett v. Jarrett*, 113 Ark. 134,

167 S.W. 482 (1914); *McDaniel v. Conlan*, 134 Ark. 519, 204 S.W. 850 (1918).

#### Rental or Commercial Property.

Where an administrator contended that she was not accountable for rents collected on real estate because her dower had not been assigned and relied on this section, which permits a widow to retain possession of the dwelling house and farm attached until her dower is assigned to her, such an application should not be extended to urban property used for commercial purposes or as residential rental property, which cannot possibly be classified as a farm, even though this section should be liberally interpreted in favor of the widow. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

#### Rights to Rents.

A widow is entitled to rents until dower is assigned, although she is the administrator. *Mock v. Pleasants*, 34 Ark. 63 (1879).

Where widow rented homestead which was subject to mortgage given by husband before marriage, she acquired no rights to rents, where before rents were due, the mortgagee brought suit to foreclose his



lien and procured the appointment of a receiver to collect the rents. *Wood v. Big-ham*, 170 Ark. 253, 279 S.W. 779 (1926).

#### **Waiver.**

Where a widow charged herself, as administrator, with the rents of her hus-

band's mansion from the date of his death until dower was assigned, she was deemed to have waived her rights. *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229 (1900).

### **28-39-104. Allowance paid surviving spouse out of rent until apportionment of curtesy or dower.**

Until curtesy or dower is apportioned, the court shall order such sums to be paid to the surviving spouse out of the rent of the real estate as shall be in proportion to his or her interest in the real estate.

**History.** Rev. Stat., ch. 4, § 139; C. & M. Dig., § 89; Pope's Dig., § 89; Acts 1981, No. 714, § 71; A.S.A. 1947, § 62-2501.3.

#### **CASE NOTES**

##### **ANALYSIS**

Personal Right.  
Share of Rents.

#### **Personal Right.**

This right is personal to the widow and does not survive to her administrator, unless she has prosecuted her claims for rent during her lifetime. *Burrus v. Butt*, 126 Ark. 584, 191 S.W. 223 (1917).

#### **Share of Rents.**

Under this section, a widow is given the same proportion of rents, under the stat-

ute, collected from the real property of deceased, whether rents be treated as personalty or as part of the realty. *Mayo v. Arkansas Valley Trust Co.*, 132 Ark. 64, 200 S.W. 505 (1917).

**Cited:** *Less v. Less*, 147 Ark. 432, 227 S.W. 763 (1921); *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

### **28-39-105. Advancements to minor distributees.**

If the court finds that the estate is evidently solvent and that the share of a distributee who is a minor is sufficient to provide therefor, the court may order the personal representative to pay an allowance, reasonable according to the usual standard of living of the family, to the guardian of the person or estate of the minor distributee for his or her maintenance, care, or education, and to charge the allowance against the share of the distributee.

**History.** Acts 1949, No. 140, § 109; A.S.A. 1947, § 62-2502.

#### **CASE NOTES**

##### **ANALYSIS**

Discretion of Court.  
Factors Determining Amount.  
Provisions of Will.

#### **Discretion of Court.**

An administrator stricti juris had no right to make expenditures out of the assets of an estate for the support of the children of the intestate; however, in a



suit by the heirs against him for an account, the chancellor could exercise a discretion in allowing them if they were made in good faith. *Martin v. Campbell*, 35 Ark. 137 (1879) (decision under prior law).

#### **Factors Determining Amount.**

In an accounting by an administrator for expenditure for maintenance and education of a minor son of the intestate, credit should be allowed only for such expenditures as were in keeping with the son's station in life and the value of the estate. *Alcorn v. Alcorn*, 183 Ark. 342, 35 S.W.2d 1027 (1931) (decision under prior law).

#### **Provisions of Will.**

Where decedent's will provided that his daughter should be educated out of the assets of his estate and the executor and guardian executed a note to an individual for such expenses who presented the note to the probate court for allowance in the presence of the administrator in succession, the claim was properly allowed as against contention by the administrator that it was not a claim against the estate but was a debt against the guardian and as such was barred by the statute of limitations. *Perry v. Field*, 40 Ark. 175 (1882) (decision under prior law).

## **SUBCHAPTER 2 — HOMESTEAD RIGHTS**

### **SECTION.**

28-39-201. Rights of surviving spouse and children.

28-39-202. Petition to reserve homestead.

28-39-203. Appraisal of homestead — Effect.

28-39-204. Sale of homestead exceeding value limitations.

### **SECTION.**

28-39-205. Contest of commissioners' report.

28-39-206. [Repealed.]

28-39-207. Disturbance of possession — Penalty.

**Cross References.** Homestead rights of widow and children, Ark. Const., Art. 9, § 6.

Rural homesteads, limitations, Ark. Const., Art. 9, § 4.

Urban homesteads, limitations, Ark. Const., Art. 9, § 5.

**Effective Dates.** Acts 1873, No. 105, § 11: effective on passage.

Acts 1981, No. 663, § 9: Mar. 23, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to homestead does not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the rights and interests of a surviving spouse in the homestead of his or her deceased spouse, without reference to the sex of the surviving spouse. Therefore, an emergency is declared to exist, and this act being necessary for the pres-

ervation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

## RESEARCH REFERENCES

**Am. Jur.** 40 Am. Jur. 2d, Homestead, § 152 et seq.

**C.J.S.** 40 C.J.S., Homesteads, § 165 et seq.

**U. Ark. Little Rock L.J.** Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.

## 28-39-201. Rights of surviving spouse and children.

(a) If the owner of a homestead dies leaving a surviving spouse, but no children, and the surviving spouse has no separate homestead in his or her own right, the homestead shall be exempt, and the rents and profits thereof shall vest in the surviving spouse during his or her natural life.

(b) However, if the owner leaves one (1) or more children, the child or children shall share with the surviving spouse and be entitled to one-half ( $\frac{1}{2}$ ) the rents and profits till each of them arrives at twenty-one (21) years of age, each child's right to cease at twenty-one (21) years of age, and the shares to go to the younger children and then all to go to the surviving spouse. The surviving spouse or children may reside on the homestead or not.

(c) In case of the death of the surviving spouse, all of the homestead shall be vested in the minor children of the original homestead owner.

(d) Any rights and benefits given by this section shall not vest until the parties have been continuously married to each other for a period in excess of one (1) year.

**History.** Acts 1981, No. 663, § 5; A.S.A. 1947, § 30-225.

**Publisher's Notes.** In *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981), the Arkansas Supreme Court held that various statutes containing dower provisions were unconstitutional under the Fourteenth Amendment to the U.S. Constitution because they were gender-based and did not serve an important governmental function. The statutes involved (§§ 28-11-101, 28-11-201, 28-11-301, 28-11-303, 28-11-306, 28-39-101, 28-39-401) have since

been amended to delete the gender-based classifications. The court recognized in the *Stokes* case that Ark. Const., Art. 9, § 6, which determines the homestead rights of a surviving widow and children, is also gender-based but refrained from passing on the validity of the section since homestead rights were not involved in the case. In response to this decision, the Arkansas General Assembly enacted the Homestead Exemption Act of 1981 (§§ 16-66-210, 28-39-201), which provides a homestead exemption that is not gender-based.

## RESEARCH REFERENCES

**Ark. L. Notes.** Laurence, Does Arkansas's Homestead Exemption Survive a Divorce? Should It?, 1988 Ark. L. Notes 15.

**Ark. L. Rev.** Comment, Arkansas Marriage: A Partnership Between a Husband

and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

**U. Ark. Little Rock L.J.** Legislative Survey, Property, 4 U. Ark. Little Rock L.J. 607.



CASE NOTES

ANALYSIS

Grandchildren.  
Spouse.

**Grandchildren.**

This section follows the language of Ark. Const., Art. 9, § 6; as in the Constitution, this section does not mention or provide for grandchildren. *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

The minor grandchildren of a decedent who would inherit from the decedent under the laws of descent and distribution do not have homestead rights under this sec-

tion, because they do not fall within the definition of “child” in § 28-1-102(a)(1). *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994).

**Spouse.**

Trial court did not err in finding a wife was entitled to a homestead share of a testator’s estate under subsection (a) of this section despite the fact that they had been separated for 17 years, a the evidence showed the wife did not intend to abandon the marital home but intended to return when the wife felt the testator was no longer abusive. *Sexton v. Sexton* (In re Sexton), 2011 Ark. App. 163, — S.W.3d — (2011).

**28-39-202. Petition to reserve homestead.**

(a) Whenever any resident of this state shall die, leaving a surviving spouse or children who may desire to claim the benefit of Arkansas Constitution, Article 9, §§ 6 and 10 or § 28-39-201, he or she shall file with the probate clerk of the circuit court of the county in which the homestead is situated an accurate description of the land so claimed, or, if the land is a lot in any city, town, or village, a description of the lot shall be filed, and the surviving spouse and children shall apply to have the land or lot reserved from sale.

(b) Immediately after the filing of the description and application, it shall be the duty of the clerk to enter upon the records of the court that the homestead has been duly reserved from sale upon the application of the claimant.

**History.** Acts 1873, No. 105, §§ 1, 2, p. 244; C. & M. Dig., §§ 5525, 5526; Pope’s Dig., §§ 7164, 7165; Acts 1981, No. 714,

§ 43; A.S.A. 1947, §§ 62-601, 62-602; Acts 2003, No. 1185, § 274.

CASE NOTES

ANALYSIS

Husband’s Interest.  
Laches.  
Meaning of “Lot.”  
Selection of Homestead.  
Vesting.

**Husband’s Interest.**

Husband’s interest in wife’s ancestral lands is fixed by former § 61-228 (repealed), and the law gives the husband no additional right of homestead in his deceased wife’s land. *Trice v. Miller*, 217 Ark. 229, 229 S.W.2d 233 (1950).

**Laches.**

A widow is entitled to have dower and homestead allotted and admeasured in time in the land if it can be done without great prejudice to the parties; therefore, a widow was entitled to have the order of a probate court assigning her dower and homestead affirmed, and laches could not be urged by the son against his mother, the widow, inasmuch as he had entered into an agreement with his mother and brother as to farming the land, he also having agreed to the report of the commissioners allotting the dower and home-

stead lands. *Marsh v. Marsh*, 230 Ark. 59, 320 S.W.2d 754 (1959).

#### **Meaning of "Lot."**

Town or city lot was understood to be the piece of ground on which the head of a family had a house, with appurtenances, maintained as a home, without regard to whether it contained more or less than one lot according to the plat or survey of the city or town. *Wassell v. Tunnah*, 25 Ark. 101 (1867) (decision under prior law).

#### **Selection of Homestead.**

The domicile of the wife and minor children follows that of the husband, and their actual personal residence at the homestead place is not necessary to perfect the right in him, or to entitle them to the benefit of it after his death. Where the

head of a family has, in good faith, selected a place of residence, owns the land, and has entered and resides upon it, the absence of the wife and children might require stronger proof of intention, but nothing more. *Johnston v. Turner*, 29 Ark. 280 (1874).

#### **Vesting.**

A clerk's reservation under this section does not vest the homestead in a widow, and such vesting does not occur until the commissioners appointed under § 28-39-203 have reported; even then vesting is subject to contest as provided in §§ 28-39-203 — 28-39-206. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

**Cited:** *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

### **28-39-203. Appraisal of homestead — Effect.**

(a) Upon written application to the clerk by any party interested in the estate of a deceased person, setting forth that the homestead so claimed by the surviving spouse or children, if a lot in any city, town, or village, exceeds the value of two thousand five hundred dollars (\$2,500), it shall be the duty of the clerk to appoint forthwith three (3) trustworthy and disinterested citizens of the county as commissioners.

(b) After having been duly summoned and sworn by the clerk for that purpose, the commissioners shall proceed without delay to make a fair appraisal of the value of the lot, with the dwellings and appurtenances thereon. Within ten (10) days thereafter, they shall return the appraisal to the office of the clerk, to be by him or her immediately filed.

(c) If a majority of the commissioners decides that the lot so claimed as a homestead is within the valuation prescribed by the Arkansas Constitution, then it shall be the duty of the clerk to make an entry upon the records of the court, reciting the proceedings had and the return of the commissioners, and vesting the homestead in the party or parties claimant, and, also, to tax the costs of the proceedings against the party at whose instance the appraisal was made.

(d) However, if the decision is that the lot exceeds in value the amount exempted by the Arkansas Constitution, it shall be the duty of the clerk to note the excess upon the record and tax the costs of the proceedings to the claimants.

**History.** Acts 1873, No. 105, §§ 3, 4, p. 244; C. & M. Dig., §§ 5527 — 5529; Pope's

Dig., §§ 7166 — 7168; Acts 1981, No. 714, § 44; A.S.A. 1947, §§ 62-603, 62-604.



## CASE NOTES

**Cited:** Price v. Price, 253 Ark. 1124, 491 S.W.2d 793 (1973).

### 28-39-204. Sale of homestead exceeding value limitations.

(a) Whenever it shall be made to appear to the satisfaction of the court having probate jurisdiction, by the appraisal of the commissioners provided for in this chapter, that the lot exceeds in value the sum of two thousand five hundred dollars (\$2,500), it shall be the duty of the court to order the lot to be sold by the sheriff of the county, at public auction to the highest bidders, for cash in hand, within sixty (60) days after the making of the order, and, upon thirty (30) days' advertisement of the sale and actual written notice served upon the surviving spouse and children, as to the time, place, and terms of the sale.

(b)(1) It shall be the duty of the sheriff, should the lot bring more than two thousand five hundred dollars (\$2,500), to pay over immediately the excess to the administrator or executor of the estate of the deceased and to hold the two thousand five hundred dollars (\$2,500), subject to the order of the court or the judge, either in term time or in vacation, as the case may be.

(2) It shall be the duty of the court to require a full and particular account of the action of the sheriff in the premises, which shall be filed with the clerk of the court within ten (10) days after the sale.

(3) At any time after the filing of the statement, the court or judge shall make an order allowing the surviving spouse or children, as the case may be, to select a homestead in any part of the state, which is to be paid for under the direction and supervision of the court, or judge in vacation.

(c) If the lot does not bring more than the sum of two thousand five hundred dollars (\$2,500), it shall not be again offered for sale, but shall thereafter constitute the homestead of the surviving spouse or children.

**History.** Acts 1873, No. 105, § 5, p. Dig., §§ 7169-7173; Acts 1981, No. 714, 244; C. & M. Dig., §§ 5530-5534; Pope's §§ 45, 46; A.S.A. 1947, §§ 62-605, 62-606.

## CASE NOTES

#### Value Erroneous.

A court did not err in not ordering a sale under this section where the value as

fixed by the commissioners was erroneous. Price v. Price, 258 Ark. 363, 527 S.W.2d 322 (1975).

### 28-39-205. Contest of commissioners' report.

(a) Either party may put in issue the truth of the report of the commissioners, by a petition filed in the court having probate jurisdiction.

(b) A summons shall be issued as in other cases, giving at least fifteen (15) days' notice to the adverse party, requiring him or her to appear and answer.

(c) The costs of these proceedings shall be paid as in other cases.

**History.** Acts 1873, No. 105, § 6, p. 244; C. & M. Dig., § 5535; Pope's Dig., § 7174; A.S.A. 1947, § 62-607.

#### CASE NOTES

**Cited:** Price v. Price, 258 Ark. 363, 527 S.W.2d 322 (1975).

#### 28-39-206. [Repealed.]

**Publisher's Notes.** This section, concerning appeal, was repealed by Acts 2001, No. 952, § 1. The section was derived from Acts 1873, No. 105, § 7, p. 244; C. & M. Dig., § 5536; Pope's Dig., § 7175; Acts 1981, No. 714, § 47; A.S.A. 1947, § 62-608.

#### 28-39-207. Disturbance of possession — Penalty.

When the provisions of the foregoing sections have been complied with by the parties claimant, any administrators or executors of the estate of the deceased who shall assume the possession of or in any manner disturb the surviving spouse or children of the deceased in the enjoyment of the homestead, or undertake to sell the homestead, shall be adjudged guilty of a misdemeanor. Upon conviction, the administrator or executor shall be imprisoned in the county jail for a term not less than one (1) month nor more than two (2) months and shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) and shall also be liable upon his or her official bond to the injured parties in twice the amount of damages which they may have sustained.

**History.** Acts 1873, No. 105, § 9, p. 244; C. & M. Dig., § 5538; Pope's Dig., § 7177; Acts 1981, No. 714, § 48; A.S.A. 1947, § 62-609.

#### CASE NOTES

##### **Rights of Purchaser Under Void Sale.**

A purchaser at a sale of a homestead contrary to law, and by which sale the administrator was guilty of a violation of this section, was not an accomplice in the guilt (although he was an appraiser of the homestead) where he did not advise and encourage the sale; and, as such, the pur-

chaser at the void sale was entitled to subrogation to the rights of the creditors whose claims were discharged by payment of the purchase money realized from the sale. Bond v. Montgomery, 56 Ark. 563, 20 S.W. 525 (1892); Harris v. Watson, 56 Ark. 574, 20 S.W. 529 (1892); Johnson v. Taylor, 140 Ark. 100, 215 S.W. 162 (1919).



SUBCHAPTER 3 — ASSIGNMENT OF DOWER AND CURTESY

- SECTION.  
28-39-301. Assignment by heir — Acceptance.  
28-39-302. Assignment by heir — Grant of severance rights required.  
28-39-303. Proceedings for allotment.  
28-39-304. Assignment by commissioners.  
28-39-305. Rental of indivisible property.  
28-39-306. Sale of property indivisible without prejudice.

- SECTION.  
28-39-307. Rights of surviving spouse when dower or curtesy land alienated by heir.  
28-39-308. Surviving spouse's bequest of growing crop.  
28-39-309. Recovery of dower or curtesy lands taken from surviving spouse — Damages.

**Cross References.** Provisions in lieu of dower, effect, election, § 28-11-401 et seq.  
**Effective Dates.** Acts 1857, § 5, p. 167: effective on passage.  
Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circum-

stances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

**Am. Jur.** 25 Am. Jur. 2d, Dower, § 28 et seq.  
**Ark. L. Rev.** Estate Planning with Disclaimers in Arkansas, 27 Ark. L. Rev. 411.

**C.J.S.** 28 C.J.S., Dower, § 85 et seq.  
**U. Ark. Little Rock L.J.** Tyler, Survey of Business Law, 3 U. Ark. Little Rock L.J. 149.

28-39-301. Assignment by heir — Acceptance.

- (a) It shall be the duty of the heir at law of any estate of which the surviving spouse is entitled to dower or curtesy to lay off and assign the dower or curtesy as soon as practicable after the death of the deceased spouse. If the heirs to any estate are minors, they shall act, in the assignment of dower or curtesy, by their guardians.
- (b) If the dower or curtesy assigned by the heir at law is accepted by the surviving spouse, the heir at law shall make a statement of the assignment, specifying what lands have been assigned, and the acceptance of the surviving spouse shall be endorsed thereon.
- (c) The statements and specification of dower or curtesy, and acceptance thereof, shall be proved or acknowledged by both parties and filed

with and recorded by the probate clerk of the circuit court, which will then be a sufficient assignment of dower or curtesy and shall bar any further demand for dower or curtesy in the property specified in the statement.

**History.** Rev. Stat., ch. 52, §§ 29-31; C. & M. Dig., §§ 3544-3546; Pope's Dig., §§ 4430-4432; Acts 1981, No. 714, §§ 49-51; A.S.A. 1947, §§ 62-701 — 62-703.

## CASE NOTES

### ANALYSIS

Assignment.  
Commutation.  
Conveyance of Unassigned Dower.  
Effect of Assignment.  
Failure to Assign.  
Nature of Dower Interest.  
Possession by Administrator.  
Release of Unassigned Dower.  
Right to Possession.  
Tardiness.

#### Assignment.

Dower in lands is assigned by the heirs and in the personal property by the administrator. *Hill's Adm'rs v. Mitchell*, 5 Ark. (5 Pike) 608 (1844).

#### Commutation.

Dower under Arkansas law includes, by definition, the possibility of commutation to a sum certain. *Mauldin v. United States*, 468 F. Supp. 422 (E.D. Ark. 1979).

#### Conveyance of Unassigned Dower.

A widow cannot dispose of her dower interest until it has been assigned. *Jacks v. Dyer*, 31 Ark. 334, 1876 Ark. LEXIS 58 (1876).

If a widow conveys her unassigned dower interest, the heir may recover possession of the land from the widow's vendee, for the conveyance gives him a right only to have her dower set aside and assigned to him, her right of occupancy being personal and not transferable. *Stull v. Graham*, 60 Ark. 461, 31 S.W. 46 (1895); *Brinkley v. Taylor*, 111 Ark. 305, 163 S.W. 521 (1914).

A conveyance by a widow of unassigned dower has been upheld in equity. *Weaver v. Rush*, 62 Ark. 51, 34 S.W. 256 (1896); *Barnett v. Meacham*, 62 Ark. 313, 35 S.W. 533 (1896).

#### Effect of Assignment.

Where a widow and her daughters agreed, by reference to actuarial tables,

that the present cash value of the widow's commuted life interest in real estate left by the decedent was \$17,991.36, this amount was paid to the widow in cash out of the estate, and it was not necessary to sell any of the realty; and where on payment to the widow of her commuted dower and homestead, the heirs at law became unconditionally entitled to the fee in their father's lands, this \$17,991.36 qualified for the marital deduction under section 2056 of the Internal Revenue Code (26 U.S.C. § 2056). *Mauldin v. United States*, 468 F. Supp. 422 (E.D. Ark. 1979).

#### Failure to Assign.

Occupancy of homestead was not adverse to heirs where they failed to assign dower. *Boyd v. Epperson*, 149 Ark. 527, 232 S.W. 939 (1921).

#### Nature of Dower Interest.

Until it is assigned to her, a widow's dower is merely a right to compel the setting aside to her of her dower interest, and not an estate in itself, but, when assigned, it becomes a life estate in the lands assigned. *Bradham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968).

#### Possession by Administrator.

The inheritance is cast upon the heir, and it is his duty to assign the widow's dower; however, until the debts are paid the administrator is entitled to possession. *Menifee's Adm'rs v. Menifee*, 8 Ark. (3 English) 9 (1847), and *Morrill v. Menifee*, 5 Ark. (5 Pike) 629 (1844).

#### Release of Unassigned Dower.

A widow may, before assignment, release to the persons holding legal title. *Reed v. Ash*, 30 Ark. 775 (1875).

#### Right to Possession.

Though the heir is a minor, a widow is still entitled to remain in possession until dower is assigned. *Trimble v. James*, 40



Ark. 393 (1883); *Wallace v. King*, 205 Ark. 681, 170 S.W.2d 377 (1943).

**Tardiness.**

Since this section places the duty of allotting dower or curtesy upon the heir at law, the fact that the surviving husband was tardy in filing his petition for allotment of curtesy will not be considered a

waiver against the remaining funds, particularly when such a waiver would work in favor of the heir at law who had the duty to allot curtesy. *Quick v. Davidson*, 261 Ark. 38, 545 S.W.2d 917 (1977).

**Cited:** *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981).

**28-39-302. Assignment by heir — Grant of severance rights required.**

(a) The heirs in any estate cannot assign or secure an assignment of dower or curtesy in lands in this state unless and until the heirs of the estate comply with the provisions set out in subsections (b) and (c) of this section.

(b) Before assignment of dower or curtesy can be made by the heirs as against a surviving spouse, the heirs shall first execute an agreement, or the agreement of a guardian shall be approved by the court, by which agreement the surviving spouse is given permission to sell timber on lands set aside to the surviving spouse under selective cutting practices as used or adopted by general practice in the area where the land is situated.

(c) In addition to rights granted in subsection (b) of this section, the heirs shall grant, by proper agreement, to the surviving spouse, the right to execute good, valid, and binding oil and gas leases covering lands set aside to the surviving spouse by which the surviving spouse shall receive the bonus money for any lease and receive the delay rentals so long as they are payable, or so long as the surviving spouse lives.

(d) Should there be production of oil or gas under any lease executed by the surviving spouse, he or she shall be entitled to receive the royalty payments so long as the surviving spouse lives.

**History.** Acts 1961, No. 189, §§ 1-4; 1981, No. 714, §§ 63-66; A.S.A. 1947, §§ 62-722 — 62-725.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Wright, The Arkansas Law of Oil and Gas, 9 U. Ark. Little Rock L.J. 223.

**28-39-303. Proceedings for allotment.**

(a) If dower or curtesy is not assigned to the surviving spouse within one (1) year after the death of his or her spouse, or within three (3) months after demand made therefor, the surviving spouse may file a written petition in the circuit court. This petition shall include a description of the lands in which he or she claims dower or curtesy, the

names of those having interest in the lands, and the amount of the interest briefly stated in ordinary language with a prayer for the allotment of dower or curtesy. All persons interested in the property shall be summoned to appear and answer the petition.

(b) Upon the petition by all interested in the property being filed, or upon a summons being served upon all who have an interest in the property, the circuit court may make an order for the allotment of dower or curtesy according to the rights of the parties by commissioners appointed according to law.

(c) Parties interested may be constructively summoned, as provided in § 16-58-130.

(d)(1) No verification shall be required to the petition or answer.

(2) Petitions for dower or curtesy shall be heard and determined by the court without the necessity of formal pleading upon the petition, answer, exhibits, and other testimony.

(e) If the petition is filed against infants or persons of unsound mind, the guardian or committee may appear and defend for them and protect their interests, and, if the guardian or committee do not appear and defend, the court shall appoint some discreet person for that purpose.

(f) If any person summoned, as provided in this section, desires to contest the rights of the petitioner or the statements in the petition, he or she shall do so by a written answer, and the questions of the law and fact thereupon arising shall be tried and determined by the circuit court.

(g) The costs of the division and allotment shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong.

**History.** Rev. Stat., ch. 52, §§ 32, 37, 39; Civil Code, §§ 538-541, 543, 547, 548; C. & M. Dig., §§ 3547-3552, 3560; Pope's Dig., §§ 4433-4438, 4446; Acts 1981, No.

714, §§ 52-54; A.S.A. 1947, §§ 62-704 — 62-710, 62-721; Acts 2003, No. 1185, § 275.

## CASE NOTES

### ANALYSIS

Actions.  
Estoppel.  
Evidence.  
Jurisdiction.  
Laches.  
Limitations.  
Notice.  
Parties.  
Petition.  
Service.

### Actions.

The executors of a deceased husband may not bring an action to have dower set

aside to the widow. *Jameson v. Davis*, 124 Ark. 399, 187 S.W. 314 (1916).

### Estoppel.

Where widow joined with deceased's son in petitioning that certain lands be awarded to him, she was thereafter estopped to assert a claim for dower against the purchaser from the son. *Owen v. Cox*, 122 Ark. 78, 182 S.W. 559 (1916).

### Evidence.

There is no authority that would allow the probate court to receive evidence of the property's value and then place a value on the property accordingly. In re



Estate of Jones, 317 Ark. 606, 879 S.W.2d 433 (1994).

### **Jurisdiction.**

This statutory remedy does not oust the jurisdiction of equity. *Johnson v. Johnson*, 84 Ark. 307, 105 S.W. 869 (1907) (decision under prior law).

Where dower was not allotted to a widow by the probate court, although a petition was filed in the court and no final judgment rendered thereby, an action was not barred in chancery court for an allotment of dower. *Kendall v. Crenshaw*, 116 Ark. 427, 173 S.W. 393 (1915) (decision under prior law).

Where a probate court assumes jurisdiction to allot dower in personalty, a chancery court should not interfere. *Shields v. Shields*, 183 Ark. 44, 34 S.W.2d 1068 (1931) (decision under prior law).

The power of a probate court to assign dower under this subchapter does not deprive a chancery court of its inherent jurisdiction; rather, the jurisdiction of these courts to assign dower is concurrent. *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968) (decision under prior law).

### **Laches.**

A widow is entitled to have dower and homestead allotted and admeasured in time in the land if it can be done without great prejudice to the parties; therefore, a widow was entitled to have an order of a probate court assigning her dower and homestead affirmed, and laches could not be urged by the son against his mother, the widow, inasmuch as he had entered into an agreement with his mother and brother as to farming the land, he also having agreed to the report of the commissioners allotting the dower and homestead lands. *Marsh v. Marsh*, 230 Ark. 59, 320 S.W.2d 754 (1959).

### **Limitations.**

The statute of limitations runs in favor of a stranger from the date of the husband's death. *Stidham v. Matthews*, 29 Ark. 650 (1874).

A claim for dower is not barred by limitation so long as the heirs continue in possession. *Livingston v. Cochran*, 33 Ark. 294 (1878); *McWhirter v. Roberts*, 40 Ark. 283 (1883).

### **Notice.**

Where record is silent it will be presumed that notice was given. *Briggs v. Manning*, 80 Ark. 303, 80 Ark. 304, 97 S.W. 289 (1906).

Notice may be given before the application is filed. *Briggs v. Manning*, 80 Ark. 303, 80 Ark. 304, 97 S.W. 289 (1906).

Failure to summon all interested persons invalidates an allotment. *Cunningham v. Dellmon*, 151 Ark. 409, 237 S.W. 450 (1922).

Section 28-49-104, relating to compromise of claims, was inapplicable to petition of widow, as administrator, alleging that estate was insufficient to satisfy dower and statutory rights of widow or to pay claims and expenses of administration in full and seeking full distribution of assets in exchange of her payment of claims and expenses, and order granting petition would be set aside where notice provided by this section was not given. *Wilson v. Davis*, 239 Ark. 305, 389 S.W.2d 442 (1965).

### **Parties.**

The heirs and devisees are necessary parties to a suit to have dower set aside to the wife. *Jameson v. Davis*, 124 Ark. 399, 187 S.W. 314 (1916).

### **Petition.**

No dower can be assigned in lands not embraced in a petition. *Falls v. Wright*, 55 Ark. 562, 18 S.W. 1044 (1892).

A petition alleging that the plaintiff is the widow of the deceased, who was a citizen of the county, and who died possessed of certain property set out in a schedule attached to the petition, states facts sufficient to give a probate court jurisdiction to assign dower in the property. *Carter v. Younger*, 112 Ark. 483, 166 S.W. 547 (1914).

### **Service.**

Where demand was made by surviving husband for the allotment of curtesy and the demand was addressed to the beneficiary under the will as executor, the court would refuse to quash service since beneficiary was actually served personally, even though it was in his capacity as executor. *Anderson v. Parker*, 229 Ark. 683, 317 S.W.2d 721 (1958).

**Cited:** *Bradham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968).

**28-39-304. Assignment by commissioners.**

(a) In all cases when it orders and decrees dower or curtesy to any surviving spouse, the court shall appoint three (3) commissioners of the vicinity who shall proceed to the premises in question and, by survey and measurement, lay off and designate by proper metes and bounds the dower or curtesy of the surviving spouse, in accordance with the decree of the court.

(b) In all assignments of dower or curtesy to any surviving spouse, it shall be the duty of the commissioners, who may be appointed to lay off the dower or curtesy, if the estate will permit such a division without essential injury, to lay off the dower or curtesy in the lands of the deceased spouse so that the usual dwelling of the deceased spouse and family shall be included in the assignment of dower or curtesy to the surviving spouse.

(c) The commissioners appointed to lay off dower or curtesy in the lands of the deceased spouse, under existing laws, shall lay off the dower or curtesy on any part of the lands of the deceased at the request of the surviving spouse who is to be endowed, whether the lands shall include the usual dwelling of the deceased spouse and family or not, if it can be done without essential injury to the estate.

(d) The commissioners shall make a detailed report of their proceedings to the next term of the court.

(e) Upon the report's being returned, the court may confirm or set the report aside or remand it to the commissioners for correction. If approved by the court, the report shall be entered of record and be conclusive on the parties.

**History.** Rev. Stat., ch. 52, §§ 19, 40, 41; Acts 1857, § 1, p. 167; Civil Code, § 545; C. & M. Dig., §§ 3532, 3533, 3553-

3555; Pope's Dig., §§ 4417, 4418, 4439-4441; Acts 1981, No. 714, §§ 55-57, A.S.A. 1947, §§ 62-711 — 62-715.

**CASE NOTES****ANALYSIS**

Appeal.  
Distinct Rights.  
Homestead.

**Appeal.**

The fact that appellants did not appeal from order approving commissioner's report prior to probate court's final order, even though they might have done so, did not constitute a bar to a later appeal. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

**Distinct Rights.**

Dower and homestead are distinct rights, and widow is entitled to one-third

of husband's realty, including homestead, and may have it laid off elsewhere than upon the homestead. *Horton v. Hilliard*, 58 Ark. 298, 24 S.W. 242 (1893); *Jameson v. Jameson*, 117 Ark. 142, 173 S.W. 851 (1915); *Arbaugh v. West*, 127 Ark. 98, 192 S.W. 171 (1917).

**Homestead.**

The commissioners must take notice of the homestead. *Horton v. Hilliard*, 58 Ark. 298, 24 S.W. 242 (1893).

**Cited:** *Phillips v. First Nat'l Bank*, 179 Ark. 605, 17 S.W.2d 298 (1929); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).



## 28-39-305. Rental of indivisible property.

In cases in which lands or tenements will not permit division, the court, being satisfied of that fact or on the report of the commissioners to that effect, shall order that the tenements or lands be rented out and that one-third ( $\frac{1}{3}$ ) part of the proceeds be paid to the surviving spouse in lieu of dower or curtesy in the lands or tenements.

**History.** Rev. Stat., ch. 52, § 42; C. & M. Dig., § 3556; Pope's Dig., § 4442; Acts 1981, No. 714, § 58; A.S.A. 1947, § 62-716.

### CASE NOTES

#### No Sale of Tenements.

Where a widow renounced the will and a building could not be divided in order to set apart a portion for dower, she was entitled only to one-third part of the rental proceeds from the realty in lieu of

dower, but not to have the building sold to satisfy her dower interest. *Harrison v. Harrison*, 234 Ark. 271, 351 S.W.2d 441 (1961).

**Cited:** *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998).

## 28-39-306. Sale of property indivisible without prejudice.

In proceedings in the circuit court for the allotment of dower or curtesy, when it appears to the court that dower or curtesy cannot be allotted out of the real estate without great prejudice to the surviving spouse or heirs and that it will be most to the interest of the parties that the real estate may be sold, the court may decree a sale of the real estate free from the dower or curtesy and decree that a portion of the proceeds may be paid to the surviving spouse in lieu of the dower or curtesy or interest otherwise secured to the surviving spouse as to the court may seem equitable and just.

**History.** Acts 1873, No. 53, § 10, p. 113; C. & M. Dig., § 3534; Pope's Dig., § 4419; Acts 1981, No. 714, § 59; A.S.A. 1947, § 62-717.

### CASE NOTES

#### ANALYSIS

In General.  
Allotment.  
Commutation.

#### In General.

This section was not repealed by the Constitution of 1874. *Johnson v. Johnson*, 84 Ark. 307, 105 S.W. 869 (1907).

The right of a widow under this section is effective as of the date of death of the decedent. *Bradham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968).

#### Allotment.

If dower cannot be carved out of specific property, it should be allotted out of the

proceeds thereof. *Johnson v. Johnson*, 92 Ark. 292, 122 S.W. 656 (1909).

There is no authority that would allow the probate court to receive evidence of the property's value and then place a value on the property accordingly. In re *Estate of Jones*, 317 Ark. 606, 879 S.W.2d 433 (1994).

#### Commutation.

Dower under Arkansas law includes, by definition, the possibility of commutation to a sum certain. *Mauldin v. United States*, 468 F. Supp. 422 (E.D. Ark. 1979).

**Cited:** *Marsh v. Marsh*, 230 Ark. 59, 320 S.W.2d 754 (1959); *Gibson v. Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979); *Webber*

v. Webber, 331 Ark. 395, 962 S.W.2d 345 (1998).

**28-39-307. Rights of surviving spouse when dower or curtesy land alienated by heir.**

If the heir alienates lands of which a surviving spouse is entitled to dower or curtesy, he or she shall still be decreed his curtesy or her dower in the lands so alienated, in whosoever hands the land may be.

**History.** Rev. Stat., ch. 52, § 49; C. & M. Dig., § 3558; Pope's Dig., § 4444; Acts 1981, No. 714, § 61; A.S.A. 1947, § 62-719.

**28-39-308. Surviving spouse's bequest of growing crop.**

A surviving spouse may bequeath the crop in the ground of the land held by him or her in curtesy or dower at the time of his or her death. If he or she dies intestate, the crop shall go to his or her administrator.

**History.** Rev. Stat., ch. 52, § 50; C. & M. Dig., § 3559; Pope's Dig., § 4445; Acts 1981, No. 714, § 62; A.S.A. 1947, § 62-720.

**28-39-309. Recovery of dower or curtesy lands taken from surviving spouse — Damages.**

If the land assigned and laid off to any surviving spouse is deforced from his or her possession, the surviving spouse shall have an action for the recovery of possession of the land, with double damages for the deforcement, or a surviving spouse may sue for the damages alone and recover double the actual damage sustained from time to time, until the surviving spouse is put in possession of the dower or curtesy held by the deforcer or detainer.

**History.** Rev. Stat., ch. 52, § 48; C. & M. Dig., § 3557; Pope's Dig., § 4443; Acts 1981, No. 714, § 60; A.S.A. 1947, § 62-718.

**SUBCHAPTER 4 — TAKING AGAINST THE WILL**

SECTION.	SECTION.
28-39-401. Rights of surviving spouse — Limitations.	28-39-405. Right of election personal to surviving spouse.
28-39-402. Notice to spouse of right to elect.	28-39-406. Revocation of spouse's election.
28-39-403. Spouse's time limitation for filing election.	28-39-407. Rights of children or issue — Limitations.
28-39-404. Form of election — Filing.	

**Effective Dates.** Acts 1970 (1st Ex. Sess.), No. 14, § 4: Mar. 13, 1970. Emergency clause provided: "It appearing that the Legislature, in enacting The Arkansas Inheritance Code of 1969 (Act No. 303, approved March 21, 1969), failed to enact certain essential amendments to Sections 33 and 36 of Act 140 approved February 23, 1949, with the result that where a deceased testator or testatrix leaves no



surviving descendant, his or her surviving spouse conceivably has the power to nullify the will of the deceased spouse to an extent to which in some situations might be unconscionable. It was not the intention of the 1969 General Assembly in the enactment of said Act No. 303 to grant a windfall to any person and to create an inequitable result. Therefore, the passage of this Act is for the purpose of clarification and to prevent misconstruction of Act No. 303. Since all property owners and titles to property, real and personal, are affected by said Act No. 303, it is hereby declared that the passage of this Act is necessary for the immediate preservation of the public peace, health and safety; and an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage and approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been

found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

### RESEARCH REFERENCES

**ALR.** Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death. 7 A.L.R.4th 989.

Statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will. 48 A.L.R.4th 972.

**Am. Jur.** 80 Am. Jur. 2d, Wills, § 1369 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Wills — Revocation Implied from Divorce of Testator, 9 Ark. L. Rev. 182.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Ante-Nuptial Agreements in Arkansas — A Drafter's Problem, 24 Ark. L. Rev. 275.

**C.J.S.** 97 C.J.S., Wills, § 1841 et seq.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.

Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.

### 28-39-401. Rights of surviving spouse — Limitations.

(a) When a married person dies testate as to all or any part of his or her estate, the surviving spouse shall have the right to take against the will if the surviving spouse has been married to the decedent continuously for a period in excess of one (1) year.

(b) In the event of such an election, the rights of the surviving spouse in the estate of the deceased spouse shall be limited to the following:

(1) The surviving spouse, if a woman, shall receive dower in the deceased husband's real estate and personal property as if he had died intestate. The dower shall be additional to her homestead rights and statutory allowances; and

(2) The surviving spouse, if a man, shall receive a curtesy interest in the real and personal property of the deceased spouse to the same extent as if she had died intestate. The curtesy interest shall be additional to his homestead rights and statutory allowances; and

(3) If, after the assignment of dower or curtesy, as the case may be, and the payment of all statutory allowances, taxes, and debts, and the satisfaction of all testamentary gifts and devises, there shall remain some residue of the deceased spouse's estate which is not disposed of by will, then, if the deceased spouse shall have been survived by no natural or adopted child, or the descendants of any natural or adopted child, and by no parent, brother, sister, grandparent, uncle, aunt, great-grandparent, great-uncle, great-aunt, or the lineal descendants of any of them, then the surviving spouse will take by inheritance the undisposed residue.

**History.** Acts 1949, No. 140, § 33; 1970 (1st Ex. Sess.), No. 14, § 1; 1981, No. 714, § 17; A.S.A. 1947, § 60-501.

## RESEARCH REFERENCES

**Ark. L. Rev.** Comment, Arkansas Marriage: A Partnership Between a Husband and Wife, or a Safety Net for Support?, 61 Ark. L. Rev. 735.

**U. Ark. Little Rock L.J.** Note, Constitutional Law — Equal Protection — Arkansas' Gender-Based Statutes on Dower, Election, Statutory Allowances, and Homestead Are Unconstitutional, Hess v. Wims, 272 Ark. 43, 613 S.W.2d 85 (1981);

Stokes v. Stokes, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), 4 U. Ark. Little Rock L.J. 361.

Seventeenth Annual Survey of Arkansas Law — Property, 17 U. Ark. Little Rock L.J. 453.

**Ark. L. Rev.** Note, Estate of Shelfer v. Commissioner of Internal Revenue: Is the Tax Court's Position on QTIPs "Stub"born or Justified?, 48 Ark. L. Rev. 987.

## CASE NOTES

### ANALYSIS

Constitutionality.

Purpose.

Applicability of 1981 Amendment.

Devise in Lieu of Dower.

Devise Not in Lieu of Dower.

Dower.

Election.

Insurance.

Liens.

Nature of Right.

Public Policy.

Right to Exclude Spouse from Will.

Subsequent Marriage.

Time for Exercising.

Vesting of Interest.

Will Predating Marriage.

### Constitutionality.

This section, which allowed a widow, at her election, to take dower against the will of her husband under any condition, but allowed a husband to take curtesy against the will of his wife only if her will was executed before the marriage, was unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, since no valid compensatory purpose or justifiable governmental function could be



found to sustain its gender-based discrimination. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981) (decision prior to 1981 amendment).

This section was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment to the U. S. Constitution since it was gender-based and served no important governmental function. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981) (decision prior to 1981 amendment).

A devisee and beneficiary of a decedent's will who was not an heir and who stood to lose financially if the decedent's wife claimed against the will pursuant to this section and received statutory allowances provided for in § 28-39-101 had standing to challenge the constitutionality of both statutes since the test is whether the party would lose financially unless the issue was raised. *Huffman v. Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981) (decision prior to 1981 amendment).

This section, which classes differently those people who have been married less than one year from those who have been married more than one year, does not violate the equal protection clause of the 14th Amendment to the United States Constitution; this classification is not invidious because it bears a rational relationship to the permissible state objectives of preventing deathbed marriages and protecting the assets of a decedent in cases in which the assertion of a dower interest would often be contrary to the decedent's intent. In re *Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984), cert. denied, *Epperson v. Estate of Epperson*, 471 U.S. 1017, 105 S. Ct. 2022 (1985).

#### **Purpose.**

This section is designed to prevent injustices when a marriage endures until the death of the husband or the wife. *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994).

#### **Applicability of 1981 Amendment.**

Act 714 of 1981, which created gender-neutral awards of dower and curtesy under this section and allowances under § 28-39-101, is substantive rather than procedural and therefore should not be applied retroactively. *Huffman v. Dawkins*, 273 Ark. 520, 622 S.W.2d 159 (1981); *Hall v. Hall*, 274 Ark. 266, 623 S.W.2d 833

(1981), cert. denied, 456 U.S. 916, 102 S. Ct. 1770 (1982).

Since this section as it existed prior to its amendment by Act 714 of 1981, under which a widow claimed her first election against the testator's will, was declared unconstitutional and since Act 714, which was not gender-based and allowed a widow to take the same as she could have taken under the old statute, could not be applied retroactively, a widow was not entitled to dower rights from the testator's estate where her claim arose prior to the enactment of Act 714. *Stokes v. Stokes*, 275 Ark. 110, 628 S.W.2d 6 (1982).

Act 714 of 1981, which cured the constitutional infirmity of this curtesy statute by substituting a neutral-based treatment in place of the gender-based treatment, created substantive rights, not merely procedural rights, and is not subject to a retroactive application in favor of a surviving husband who sought a curtesy interest in the estate of his deceased wife. *Gent v. Goin*, 275 Ark. 479, 631 S.W.2d 303 (1982).

#### **Devise in Lieu of Dower.**

Where a husband's will made an absolute gift of both real and personal property to his wife, a subsequent item stating that the provision was in lieu of dower did not limit the wife's share to what she would have received as dower, it having only the effect of requiring the widow to make her election. *Gathright v. Gathright*, 175 Ark. 1130, 1 S.W.2d 809 (1928) (decision under prior law).

#### **Devise Not in Lieu of Dower.**

Where a will devised a homestead and certain personal property to a wife, expressly stating that it was not in lieu of dower, but in addition thereto, and directed that the residue of the testator's property should be divided, one-half to the wife and one-half to the testator's collateral heirs, it was held that the specific devise was not in lieu of dower and that she took one-half of the residue freed from his debts. *Chambless v. Gentry*, 178 Ark. 558, 11 S.W.2d 460 (1928) (decision under prior law).

#### **Dower.**

Dower is to be carved from property possessed by decedent at death and not from property thereafter changed from realty to personalty. *Atkinson v. Van*

Echaute, 236 Ark. 423, 366 S.W.2d 273 (1963).

Where a widow elects to take a dower interest against the will and consents to the conversion of the realty owned by testator at death into cash, as provided by the will, she may not, as the result of the conversion, thereby maintain a claim to one-third of the gross estate but, with respect to realty, is limited to a life interest in the proceeds from the sale of the realty. *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963).

### **Election.**

Where a will leaves the surviving spouse nothing, he or she is put to an election. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

Where the decedent had previously executed a reciprocal will and a separate contract not to revoke the wills with his first wife, and where the two wills of the couple created testamentary trusts giving the six children of their marriage the estate of the surviving spouse, the rights of the children as trust beneficiaries under the contract and reciprocal wills were paramount, and they prevailed over a second wife electing to take against the will. *Gregory v. Estate of Gregory*, 315 Ark. 187, 866 S.W.2d 379 (1993).

The decedent's surviving spouse was not entitled to take against the decedent's will where their marriage lasted only 13 days before he died, notwithstanding that they had been previously married three separate times for a total of more than 15 years. *Shaw v. Shaw*, 337 Ark. 530, 989 S.W.2d 919 (1999).

### **Insurance.**

Provisions of a will designating the particular beneficiaries for certain insurance policies which had been issued payable to testator's estate had same effect of changing the beneficiaries named in the policies as though testator had written to the insurance companies and followed their required procedure for changing beneficiaries; thus the policies did not pass to the executors as assets of the estate and were not subject to the dower interest of the testator's wife. *Clements v. Neblett*, 237 Ark. 340, 372 S.W.2d 816 (1963).

### **Liens.**

A widow who elected to take against a will could not enforce provision leaving

real property and insurance policies to nieces and nephew with instructions that all debts and taxes be paid; therefore, the widow was charged with one-half of the indebtedness in the real property. *Clements v. Neblett*, 237 Ark. 340, 372 S.W.2d 816 (1963).

### **Nature of Right.**

Where a will executed prior to marriage did not provide for the widow, the widow's right to take against the will was personal to her and did not survive where she died before making election to so take against will. *Lamb v. Ford*, 239 Ark. 339, 389 S.W.2d 419 (1965).

### **Public Policy.**

The public policy set forth in this section is disallowed only in limited circumstances such as in the case when the electing spouse was married to the decedent for less than a year. *Gregory v. Estate of Gregory*, 315 Ark. 187, 866 S.W.2d 379 (1993).

### **Right to Exclude Spouse from Will.**

A spouse has the right to make a will which excludes a surviving spouse or provides for a bequest or devise in lieu of dower; that a surviving spouse may take against a will prevents any injustice that might result from the spouse's exercise of that right. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

### **Subsequent Marriage.**

A will was not revoked by testator's marriage subsequent to its execution (but see now § 28-25-109) where no issue was born of the marriage, but the will did not exclude the widow from the interest she would have taken had her husband died intestate and devisees would take subject to the will as modified by the marriage. *Fleming v. Blount*, 202 Ark. 507, 151 S.W.2d 88 (1941) (decision under prior law).

### **Time for Exercising.**

Where a spouse dies testate, the surviving spouse must exercise the option to take against the will in his or her lifetime; otherwise, the right is forfeited because it is personal and does not survive the surviving spouse. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).



**Vesting of Interest.**

The surviving spouse's elective interest in the decedent's estate vests immediately upon the spouse's death, but it can vest only in property which the deceased spouse owned at the time of death. *Gregory v. Estate of Gregory*, 315 Ark. 187, 866 S.W.2d 379 (1993).

**Will Predating Marriage.**

Under § 28-25-109, any bequest to a former spouse is void, but the remainder of the will remains in effect; unless the will is completely revoked because all of its substantive provisions favor a decedent's former spouse, the decedent will have died testate, and this section will apply. Section 28-25-109 does not require a holding that this section is not intended

to be applied when the will predates a marriage. In *re Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984), cert. denied, *Epperson v. Estate of Epperson*, 471 U.S. 1017, 105 S. Ct. 2022 (1985).

This section does not make a distinction concerning wills that predate a marriage and those made after a marriage. *Davis v. Aringe*, 292 Ark. 549, 731 S.W.2d 210 (1987).

**Cited:** *Anderson v. Parker*, 230 Ark. 335, 323 S.W.2d 414 (1959); *Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979); *Owen v. Owen*, 267 Ark. 532, 592 S.W.2d 120 (1980); *Bennett v. Estate of Bennett*, 275 Ark. 262, 628 S.W.2d 565 (1982); *McGuire v. McGuire*, 275 Ark. 432, 631 S.W.2d 12 (1982); In *re Estate of Epperson*, 284 Ark. 35, 679 S.W.2d 792 (1984).

**28-39-402. Notice to spouse of right to elect.**

Within one (1) month after the will of a married person has been admitted to probate, the clerk shall mail a notice to the decedent's surviving spouse at his or her mailing address, if known, in which shall be stated the time within which a written election must be filed by or on behalf of the surviving spouse in order to take against the will.

**History.** Acts 1949, No. 140, § 34; A.S.A. 1947, § 60-502.

**CASE NOTES****Failure to Notify.**

The notice by a probate clerk to a surviving spouse to elect to take against a will is not jurisdictional, and therefore, a

failure to notify will not give her heirs her personal right to take against the will. *Jeffcoat v. Harper*, 224 Ark. 778, 276 S.W.2d 429 (1955).

**28-39-403. Spouse's time limitation for filing election.**

(a) The election by a surviving spouse to take against the will may be made at any time within one (1) month after the expiration of the time limited for the filing of claims.

(b) However, if, at the expiration of the period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will or to determine the existence of issue surviving the deceased or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of the surviving spouse to make an election shall not be barred until the expiration of one (1) month after the date of the final order of the circuit court adjudicating the issue in litigation.

**History.** Acts 1949, No. 140, § 35; A.S.A. 1947, § 60-503.

RESEARCH REFERENCES

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

CASE NOTES

ANALYSIS

Failure to Notify.  
Nature of Right.

**Failure to Notify.**

The notice by a probate clerk to a surviving spouse to elect to take against a will is not jurisdictional, and therefore a failure to notify will not give her heirs her personal right to take against the will. *Jeffcoat v. Harper*, 224 Ark. 778, 276 S.W.2d 429 (1955).

**Nature of Right.**

A spouse's right to elect against a will is personal and for her benefit; therefore, her heirs cannot exercise it after her death even though the spouse was insane from before testator's death until her death and although no guardian was appointed as the will suggested who could have exercised her rights. *Jeffcoat v. Harper*, 224 Ark. 778, 276 S.W.2d 429 (1955).

**28-39-404. Form of election — Filing.**

(a)(1) The election to take against the will shall be:

(A) In writing, signed and acknowledged by the surviving spouse or by the guardian of his or her estate; and

(B) Filed in the office of the probate clerk of the circuit court.

(2) It shall be in substantially the following form:

"I, A. B., surviving wife (or husband) of C. D., deceased, hereby renounce and disclaim any and all benefits under the will of C. D., and elect to take from the estate of C. D. only the property and benefits which (because of this election) will accrue to me under Section 33 of Act No. 140, approved February 23, 1949, as amended.

DATED: ....., 20.....

SIGNED: ....."

(ACKNOWLEDGMENT)

(b) The clerk shall record the election in the will records. The personal representative shall, and any interested person may, file for record with the circuit clerk and recorder of each other county in this state in which the decedent, at the time of his or her death, owned an estate of inheritance in real property a duplicate original or certified copy of the election.

**History.** Acts 1949, No. 140, § 36; 1970 (1st Ex. Sess.), No. 14, § 2; A.S.A. 1947, § 60-504; Acts 2003, No. 1185, § 276.



## CASE NOTES

**Cited:** *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970).

**28-39-405. Right of election personal to surviving spouse.**

(a) The right of election of the surviving spouse is personal. It is not transferable and does not survive the surviving spouse.

(b) The guardian of the estate of an incompetent surviving spouse, when authorized by the court having jurisdiction over the estate of the ward, may elect to take against the will in the ward's behalf.

**History.** Acts 1949, No. 140, § 37; A.S.A. 1947, § 60-505.

## CASE NOTES

## ANALYSIS

Disability of Spouse.

Nature of Right.

Time of Election.

Will Executed Prior to Marriage.

Will Leaving Nothing.

**Disability of Spouse.**

A spouse's right to elect against a will is personal and for her benefit; and therefore her heirs cannot exercise it after her death even though the spouse was insane from before testator's death until her death and although no guardian was appointed as the will suggested who could have exercised her rights. *Jeffcoat v. Harper*, 224 Ark. 778, 276 S.W.2d 429 (1955).

**Nature of Right.**

The provision that the right of election of the surviving spouse is personal, is not transferable, and does not survive the surviving spouse does not make the interest secured by the exercise of such an election a terminable or contingent estate. *Bradham v. United States*, 287 F. Supp. 10 (W.D. Ark. 1968).

**Time of Election.**

Where a spouse dies testate, the surviving spouse must exercise the option to take against the will in his or her lifetime; otherwise, the right is forfeited because it

is personal and does not survive the surviving spouse. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

An election to take against a will was not made in a timely manner where (1) the appellees filed the election, on behalf of the surviving spouse, to take against the will prior to the death of the surviving spouse, but (2) the appellees never sought or received the probate court's authorization prior to the time that they purported to make the election, and (3) the appellees did not seek such authorization until after the death of the surviving spouse. *Burch v. Griffe*, 342 Ark. 559, 29 S.W.3d 722 (2000).

**Will Executed Prior to Marriage.**

Where a will executed prior to marriage did not provide for a widow, the widow's right to take against the will was personal to her and did not survive where she died before making an election to take against will. *Lamb v. Ford*, 239 Ark. 339, 389 S.W.2d 419 (1965).

**Will Leaving Nothing.**

Where a husband's will left nothing to his wife and she died without electing to take against the will, her right to claim dower did not survive her and could not be exercised by her estate. *Estate of Dahlmann v. Estate of Dahlmann*, 282 Ark. 296, 668 S.W.2d 520 (1984).

**28-39-406. Revocation of spouse's election.**

An election made by or on behalf of a surviving spouse to take against the will shall be binding and shall not be subject to revocation, except within the time provided by § 28-39-403 for filing an election and prior to any distribution made on the basis of the election, or thereafter for such causes as would justify a decree for the rescission of a deed.

**History.** Acts 1949, No. 140, § 38;  
A.S.A. 1947, § 60-506.

**CASE NOTES****Election to Take Under Will.**

An election to take under a will does not bar a widow from changing her mind and deciding to renounce the will if the renunciation is made within the period allowed

for her decision and if no distribution has been made in reliance on her prior decision. *Townson v. Townson*, 221 Ark. 610, 254 S.W.2d 952 (1953).

**28-39-407. Rights of children or issue — Limitations.**

(a) **SUBSEQUENTLY BORN OR ADOPTED CHILDREN.** Whenever a child shall have been born to or adopted by a testator after the testator has made his or her will, and the testator shall die leaving the after-born or adopted child not mentioned or provided for in his or her will either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child. The child shall be entitled to recover from the devisees in proportion to the amounts of their respective shares, that portion of the estate which he or she would have inherited had there been no will.

(b) **PRETERMITTED CHILDREN.** If, at the time of the execution of a will, there is a living child of the testator, or living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child or issue. The child or issue shall be entitled to recover from the devisees in proportion to the amounts of their respective shares, that portion of the estate which he or she or they would have inherited had there been no will.

**History.** Acts 1949, No. 140, § 39;  
A.S.A. 1947, § 60-507.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Atkinson, A Comparison of Ark. Code Ann. § 28-39-407 With Uniform Probate Code § 2-302, 1995 Ark. L. Notes 1.

**Ark. L. Rev.** Decedent's Estates —

Rights of a Judgment Lien Creditor Against a Pretermitted Heir, 25 Ark. L. Rev. 353.

**U. Ark. Little Rock L.J.** Survey — Property, 12 U. Ark. Little Rock L.J. 225.



## CASE NOTES

## ANALYSIS

Constitutionality.

Construction.

Purpose.

Holographic Will.

Intent of Testator.

Presumptions.

Pretermitted Children.

Remedies.

Subsequently Born or Adopted Children.

Sufficiency of Designation.

Testator in Loco Parentis.

Validity of Will.

**Constitutionality.**

This section held constitutional. *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987).

**Construction.**

Subsection (b) of this section applied only to wills and not to trusts created during the life of the settler, because the pretermitted-heir statute spoke only in terms of wills, and not of trusts; the pretermitted-heir statute, which spoke only in terms of the execution of a will, did not apply in instances in which there was no will. *Kidwell v. Rhew*, 371 Ark. 490, 268 S.W.3d 309 (2007).

**Purpose.**

The object of former similar statute was to prevent injustice to a child or descendant from occurring by reason of the forgetfulness of a testator who might, at the time of making his will, overlook the fact that he has a child or descendant. *Culp v. Culp*, 206 Ark. 875, 178 S.W.2d 52 (1944) (decision under prior law).

The purpose of a former similar statute was not to require a testator to make some devise to each of his children, but to insure that there should be no unintentional disinheritance of a child by the testator. *Taylor v. Cammack*, 209 Ark. 983, 193 S.W.2d 323 (1946) (decision under prior law).

The purpose of the pretermitted child statute is not to compel a testator to make a provision for his children, but to guard against testamentary thoughtlessness. *Young v. Young*, 288 Ark. 199, 703 S.W.2d 457 (1986).

**Holographic Will.**

Holographic will held to be clear in its provision and to take precedence over any other will. *Mangum v. Estate of Fuller*, 303 Ark. 411, 797 S.W.2d 452 (1990).

**Intent of Testator.**

Extrinsic evidence is inadmissible to show that a testator was aware of a pretermitted child and intended to disinherit her. *Hare v. First Sec. Bank*, 261 Ark. 79, 546 S.W.2d 427 (1977).

Under this section, extrinsic evidence of the testator's intent is not admissible. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977); *Mangum v. Estate of Fuller*, 303 Ark. 411, 797 S.W.2d 452 (1990).

This section operates in favor of a pretermitted child without regard to the real intention of the testator in regard to the omission. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

The fact that one paragraph of a will provided that the decedent's estate would, upon nonsurvival of all the named heirs, pass under the laws of descent and distribution of Missouri did not establish that the decedent intended to omit her sons by her first marriage from the will, even though they were not mentioned in the will. *Robinson v. Mays*, 271 Ark. 818, 610 S.W.2d 885 (1981).

Where a decedent's holographic will, written during his residency in Canada, did not mention his children, under subsection (b) of this section that the omission operated in favor of the pretermitted children; hence, in the letter order issued by the trial court the children were properly awarded the decedent's real property in Arkansas. *Craig v. Carrigo*, 353 Ark. 761, 121 S.W.3d 154 (2003).

**Presumptions.**

In a suit to recover the share of a child pretermitted by will, evidence that the plaintiff was born two months after her mother's marriage and that she resembled a man who had kept company with her mother was not sufficient to overcome the presumption that she was legitimate. *Jacobs v. Jacobs*, 146 Ark. 45, 225 S.W. 22 (1920) (decision under prior law).

The presumption against intestacy is subordinate to the statutory presumption

against the disherison of a child or the issue of a deceased child because the presumption against intestacy actually is much more than a presumption. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

An omission in a will is presumed to be unintentional where the testator fails to mention his children or provide for them as a member of a class, if no contrary intent appears in the will itself. *Robinson v. Mays*, 271 Ark. 818, 610 S.W.2d 885 (1981).

### **Pretermitted Children.**

The great grandchild of a testator could not recover upon the ground that she was not mentioned in the will of her ancestress if she was not living at the time the will was made or if her mother was then living and was named by class as a grandchild. *King v. Byrne*, 92 Ark. 88, 122 S.W. 96 (1909) (decision under prior law).

Grandchildren held to be pretermitted. *Gray v. Parks*, 94 Ark. 39, 125 S.W. 1023 (1910) (decision under prior law); *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981).

Adopted children entitled to inherit as pretermitted children. *James v. Helmich*, 186 Ark. 1053, 57 S.W.2d 829 (1933) (decision under prior law); *Graham v. Hill*, 226 Ark. 258, 289 S.W.2d 186 (1956).

Where a daughter not mentioned in will was left something by a codicil and the codicil was invalid, she inherited as if there was no will. *Noblit v. Noblit*, 223 Ark. 220, 265 S.W.2d 520 (1954).

A pretermitted child is entitled to his remedy during the administration of an estate, and the provision for recovering from the devisee is only brought into being after the estate has been closed or after sufficient funds have been paid out of the estate to prevent the pretermitted child from acquiring his full statutory share. *Parker v. Bowlan*, 242 Ark. 192, 412 S.W.2d 597 (1967).

Where pretermitted children instituted a suit for a partition of the real estate in the estate within four months following wrongful distribution, their suit was timely and not barred by laches even though decedent had died some seven years before. *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970).

Children held to be pretermitted. *Farmers Coop. Ass'n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970); *Robinson v. Mays*, 271 Ark. 818, 610 S.W.2d 885 (1981).

Where the testator failed to name two of her children who were deceased at the time of the execution of her will and her will also included a provision "If any of my children should die before I do," the phrase "my children" was referring to only the children living at the time the codicil was executed. Thus, the grandchildren of the deceased children were pretermitted heirs and entitled to share in the estate. *Estate of Cisco v. Cisco*, 288 Ark. 552, 707 S.W.2d 769 (1986).

As a general rule, the testator's use of a word which describes a class of persons is considered to be sufficient identification of the claimant to preclude the application of the pretermitted heir statute. *Estate of Cisco v. Cisco*, 288 Ark. 552, 707 S.W.2d 769 (1986).

Grandchildren were pretermitted where neither they nor their father, who died before the will was executed, were mentioned or provided for in the will. *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987).

This section directs that children shall take as though decedent had died intestate only when testator fails to mention or provide for them, specifically or as a class, and does not permit children to take against will simply because testator failed to make provision for them in will; if testator mentioned children, specifically or as a class, this section does not apply and children are not pretermitted. *Dykes v. Dykes*, 294 Ark. 158, 741 S.W.2d 256 (1987).

If the word "heir" or "heirs" is used by the testator in a colloquial sense to refer to children, or descendants, as opposed to a technical, legal sense, then the requirements of subsection (b) are met. *Leatherwood v. Meisch*, 297 Ark. 91, 759 S.W.2d 559 (1988).

Insertion of a rule-against-perpetuities clause and other general references to undesignated persons in a testator's will did not show that testator had his grandson, as issue of the testator's predeceased child, so clearly in mind as to have met the requirements of the pretermitted child statute, subsection (b) of this section. *Alexander v. Estate of Alexander*, 351 Ark. 359, 93 S.W.3d 688 (2002).

Illegitimate child was awarded a share of his father's estate as a pretermitted heir where the wife waived an issue regarding competent jurisdiction by failing



to object to a failure to join the estate in a paternity action; moreover, collateral estoppel applied because the wife appeared at the paternity proceeding, it was fully litigated, the necessary party issue was not raised, and no appeal was filed. *Taylor v. Hamilton*, 90 Ark. App. 235, 205 S.W.3d 149 (2005).

Decedent's illegitimate, pretermitted child was not entitled to inherit from decedent as he was required to meet requirements of subsection (b) of this section, § 28-1-102(a)(1), and the six requirements of § 28-9-209(d), but he failed to show that he had been recognized by the decedent or by a court and he failed to file his action within 180 days of decedent's death. *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

### Remedies.

An omitted child or grandchild was not remitted solely to the remedy in the probate court against the devisees or legatees but could sue to recover land descended to him from purchasers holding under the devisees or legatees or under a power contained in the will. *Rowe v. Allison*, 87 Ark. 206, 112 S.W. 395 (1908) (decision under prior law).

### Subsequently Born or Adopted Children.

A child adopted three years after the adopting parents had made a will stood in the position of a natural child born subsequent to the execution of the will and inherited accordingly. *Grimes v. Jones*, 193 Ark. 858, 103 S.W.2d 359 (1937) (decision under prior law).

Son's claim pursuant to the After-Born Child Statute, subsection (a) of this section, extinguished a nephew's rights as a named beneficiary of a joint will because the son's rights prevailed where there was a conflict between the rights of the couple to execute a joint will to dispose of their estates and the rights of an after-born child. *Dotson v. Dotson*, 2009 Ark. App. 819, — S.W.3d — (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 74 (Jan. 20, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 331 (June 3, 2010).

### Sufficiency of Designation.

A will in which the testator provides for all of his children as a class without expressly naming them is a sufficient men-

tion of his children. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908); *Duensing v. Duensing*, 112 Ark. 362, 165 S.W. 956 (1914) (decision under prior law).

A bequest to a son of the testator and to son's children sufficiently designated the children. *LeFlore v. Handlin*, 153 Ark. 421, 240 S.W. 712 (1922) (decision under prior law).

Former statute was complied with where the testator either mentioned each of his children by name or provided for them as a class without naming them separately. *Yeates v. Yeates*, 179 Ark. 543, 16 S.W.2d 996, 65 A.L.R. 466 (1929) (decision under prior law).

Where testator actually wrote the name of his daughter in the body of his will along with a statement of the amount of insurance policy payable to her, he did not omit to mention the name of his daughter in his will and he did not die intestate as to her. *Culp v. Culp*, 206 Ark. 875, 178 S.W.2d 52 (1944) (decision under prior law).

Where there was uncertainty or ambiguity in designated beneficiary of a will, extrinsic evidence was admissible for purpose of identifying intended beneficiary who was found not entitled to share in estate as a pretermitted heir under subsection (b). *Tullis v. Minchew*, 239 Ark. 222, 388 S.W.2d 393 (1965).

Whether the word "descendants" as a description of the beneficiaries of the trust sufficiently describes a class within the meaning of this section is to be determined by a consideration of the will as a whole. *Petty v. Chaney*, 281 Ark. 72, 661 S.W.2d 373 (1983).

Daughter who was not mentioned or provided for by name in her father's will was sufficiently mentioned or provided for in a paragraph of the will creating a trust for the testator's "descendants" and was not entitled to share in father's estate as a child whom testator failed to provide for. *Petty v. Chaney*, 281 Ark. 72, 661 S.W.2d 373 (1983).

Considering will as a whole, reference therein to "all of my heirs or other relatives" was sufficient to mention the testator's children as a class and to exclude them from inheritance. *Young v. Young*, 288 Ark. 199, 703 S.W.2d 457 (1986).

This section does not require testator to provide for his heirs, only to mention them. Child does not have to be specifi-

cally named, but can be included as a member of the class. *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987).

### Testator in Loco Parentis.

This section is not broad enough to cover a child to whom the testator only stood in loco parentis, because birth or adoption, each, creates a permanent relationship whereas the relationship in loco parentis is temporary. *Bryant v. Thrower*, 239 Ark. 783, 394 S.W.2d 488 (1965).

### Validity of Will.

If the names of all, any, or either of testator's children or their legal representatives were omitted in his will, the will was not void, but he would be deemed as having died intestate as to those omitted. *Branton v. Branton*, 23 Ark. 569, 1861 Ark. LEXIS 161 (1861); *Boyd v. Epperson*, 149 Ark. 527, 232 S.W. 939 (1921) (decision under prior law).

Omission of the name of a child from a

will does not thereby make it void; but those omitted may recover of the devisees and legatees their distributive shares. *Trotter v. Trotter*, 31 Ark. 145 (1876); *Bloom v. Strauss*, 73 Ark. 56, 84 S.W. 511 (1904) (decision under prior law).

A will of a citizen of another state seeking to transmit lands situated in this state was without effect as to the lands where he omitted to name his only surviving child therein. *Crossett Lumber Co. v. Files*, 104 Ark. 600, 149 S.W. 908 (1912) (decision under prior law).

This section does not preclude persons other than the child from bringing a petition to contest a will. *Parker v. Bowlan*, 242 Ark. 192, 412 S.W.2d 597 (1967).

**Cited:** *Odom v. Travelers Ins. Co.*, 174 F. Supp. 426 (W.D. Ark. 1959); *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970); *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979); *Willis v. Estate of Adams*, 304 Ark. 35, 799 S.W.2d 800 (1990).

## CHAPTER 40

### PROBATE AND GRANT OF ADMINISTRATION

#### SUBCHAPTER.

1. PROCEEDINGS GENERALLY.
2. ARKANSAS ANTE-MORTEM PROBATE ACT OF 1979.
3. PROVING A LOST OR DESTROYED WILL.

#### SUBCHAPTER 1 — PROCEEDINGS GENERALLY

##### SECTION.

- 28-40-101. Character of proceeding.
- 28-40-102. Venue.
- 28-40-103. Time limit for probate and administration.
- 28-40-104. No will effectual until probated — Unprobated wills admitted as evidence.
- 28-40-105. Delivery of will by custodian.
- 28-40-106. Powers of nominated executor prior to appointment.
- 28-40-107. Petition for probate and appointment of personal representative.
- 28-40-108. Requests for notices.
- 28-40-109. Hearing on petition without notice.
- 28-40-110. Notice of hearing on petitions.
- 28-40-111. Notice of appointment of personal representative.
- 28-40-112. Search for alleged decedent.

##### SECTION.

- 28-40-113. Contest of will generally.
- 28-40-114. Notice of contest.
- 28-40-115. Contest of will — Rights of persons acquiring interest in property prior to filing of objections.
- 28-40-116. Will subsequently presented for probate.
- 28-40-117. Proof of will.
- 28-40-118. Manner of taking testimony.
- 28-40-119. Conditions on which probate ordered and letters granted.
- 28-40-120. Probate of will of nonresident.
- 28-40-121. Finality of order — Conclusiveness of finding of death.
- 28-40-122. Certificate of probate.
- 28-40-123. Recording will in other counties.



**Cross References.** Probate court has original jurisdiction over decedents' estates, § 28-1-104.

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1987 (1st Ex. Sess.), No. 16, § 4: June 12, 1987. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that

existing law relating to notice to creditors only by the publication of legal notice may be unconstitutional by reason of recent decisions of the United States Supreme Court. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 59, § 5: Nov. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain language appearing in Act 939 of the Seventy-Seventh General Assembly, was included in the act in error, thus resulting in ambiguity and uncertainty as to the meaning and effect of its provisions, and this act deletes the erroneous language of Act 929. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**ALR.** Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration. 2 A.L.R.4th 1315.

Inheritability or descendability of right to contest will. 11 A.L.R.4th 907.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary. 23 A.L.R.4th 369.

Creditor's right to prevent debtor's renunciation of benefit under will or debtor's

election to take under will. 39 A.L.R.4th 633.

**Am. Jur.** 79 Am. Jur. 2d, Wills, § 723 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly—Act 140 The Probate Code, 3 Ark. L. Rev. 375.

**C.J.S.** 95 C.J.S., Wills, § 445 et seq.

**U. Ark. Little Rock L.J.** Arkansas Law Survey, Looney, Decedents' Estates, 8 U. Ark. Little Rock L.J. 139.

## 28-40-101. Character of proceeding.

(a) The administration of the estate of a decedent from the filing of the petition for probate and administration or for administration until the order of final distribution and the discharge of the last personal representative shall be considered as one (1) proceeding for purposes of jurisdiction.

(b) The entire proceeding is a proceeding in rem.

(c) No notice shall be jurisdictional except as provided in §§ 28-40-110 and 28-53-103.

**History.** Acts 1949, No. 140, § 40;  
A.S.A. 1947, § 62-2101.

## CASE NOTES

### ANALYSIS

Correction of Errors.  
Failure to Notify Spouse.  
Necessity for Administration.

#### **Correction of Errors.**

If the probate court grants letters of administration instead of letters testamentary, the error should be corrected on appeal. The letters will not be void until reversed. *Jackson v. Reeve*, 44 Ark. 496 (1884) (decision under prior law).

#### **Failure to Notify Spouse.**

The notice by a probate clerk to a surviving spouse to elect to take against a will is not jurisdictional, and therefore the failure to notify will not give her heirs her personal right to take against the will. *Jeffcoat v. Harper*, 224 Ark. 778, 276 S.W.2d 429 (1955).

#### **Necessity for Administration.**

The adjudication by the probate court of the necessity for administration is conclu-

sive in a collateral issue. *Stewart v. Smiley*, 46 Ark. 373 (1885); *Sharp v. Himes*, 129 Ark. 327, 196 S.W. 131 (1917) (decisions under prior law).

The appointment by the probate court of an administrator is conclusive of the question of necessity for administration, but it is not conclusive of the question whether or not the lands of the estate are needed to pay debts. *Turley v. Gorman*, 133 Ark. 473, 202 S.W. 822 (1918) (decision under prior law).

**Cited:** *Brickey v. Lacy*, 247 Ark. 906, 448 S.W.2d 331 (1969); *Brown v. Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990); *Schieffler v. Pulaski Bank & Trust Co. (In re Molitor)*, 183 B.R. 547 (Bankr. E.D. Ark. 1995); *Wilson v. Wilson*, 327 Ark. 386, 939 S.W.2d 287 (1997); *Ferguson v. Ferguson*, 2009 Ark. App. 549, 334 S.W.3d 425 (2009).

## 28-40-102. Venue.

(a) The venue for the probate of a will and for administration shall be:

(1) In the county in this state where the decedent resided at the time of his or her death;

(2) If the decedent did not reside in this state, then in the county wherein is situated the greater part, in value, of the property of the decedent located in this state;

(3) If the decedent had no residence or property in this state, but died in this state, then in the county in which he or she died; and

(4) If the decedent had no residence or property in this state and died outside of this state, then in any county in which a cause of action may be maintained by his or her personal representative.

(b) The proceedings shall be deemed commenced by the filing of a petition, the issuance of letters, and the qualification of a personal representative. The proceeding first legally commenced is extended to all of the property in this state.

(c)(1) If proceedings are commenced in more than one (1) county, they shall be stayed except in the county where first commenced until final determination of venue by the circuit court of the county where first commenced.



(2) If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county.

(d)(1) If it appears to the court at any time before the order of final distribution that the proceeding was commenced in the wrong county or that it would be for the best interest of the estate, then the court, in its discretion, may order the proceeding with all papers, files, and a certified copy of all orders therein transferred to another circuit court, which need not be a court of proper venue under other provisions of this section. The other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.

(2) The bond, if any, of the personal representative filed in the court from which the proceeding is transferred shall remain in effect unless and until replaced by a new bond ordered and approved by the court to which the proceeding is transferred.

**History.** Acts 1949, No. 140, § 41;  
A.S.A. 1947, § 62-2102.

## RESEARCH REFERENCES

**Ark. L. Rev.** Recent Development: Arkansas Act 438 of 2007, 60 Ark. L. Rev. 1023.

## CASE NOTES

### ANALYSIS

In General.  
Action to Try Title.  
Jurisdiction.  
Mandatory Provision.  
Nonresidents.  
Partition Suits.  
Probate Outside State.  
Sale of Land.  
Void Administrator Appointment.

### In General.

Nothing in this section authorizes a personal representative to sue or be sued until such time as he has received letters of administration. *Jenkins v. Means*, 242 Ark. 111, 411 S.W.2d 885 (1967).

### Action to Try Title.

Action against executor to try title to property in dispute in the probate court and to require settlement and contribution of the estate was a local and not a transitory action and properly brought in the county where the estate was being probated rather than in county where executor resided. *Gocio v. Seamster*, 203

Ark. 944, 160 S.W.2d 197 (1942) (decision under prior law).

### Jurisdiction.

Letters should be granted in county in which testator or intestate dies; the probate court of another county has no jurisdiction. *Shelton v. Shelton*, 180 Ark. 959, 23 S.W.2d 629 (1930) (decision under prior law).

### Mandatory Provision.

Provision requiring administration of estate to be in county where deceased is residing at time of death is mandatory. *Smith v. Rudolph*, 221 Ark. 900, 256 S.W.2d 736 (1953).

### Nonresidents.

The will of a nonresident of this state may have original probate in this state if the testator owned property in this state which might be the subject of administration in this state, or where there was a debt or demand due the testator which required administration to collect. However, unless a nonresident has land in this state or debt or demand owing him, the

will of the nonresident is not subject to probate in this state. *McPherson v. McKay*, 205 Ark. 1135, 172 S.W.2d 911 (1943) (decision under prior law).

It was error for the trial court to determine that it had venue to probate decedent's will because decedent was not a resident of that county at the time of his death and the statute clearly required probate proceedings to go forward in the county where decedent resided before his death; even if decedent was arguably domiciled in the county, venue was still not proper. *Lawrence v. Sullivan*, 90 Ark. App. 206, 205 S.W.3d 168 (2005).

#### **Partition Suits.**

Where the estate of a deceased person has been closed, an action for partition of the land among the heirs should be brought in the county where the land or some part of it is situated and not in the county where the deceased's personal representatives qualified. *Cowling v. Nelson*, 76 Ark. 146, 88 S.W. 913 (1905) (decision under prior law).

#### **Probate Outside State.**

Purported will of testator, who was a resident of this state, probated in Texas

under statutory provision similar to this statute was not subject to attack in the courts of this state. *State ex rel. Attorney General v. Wright*, 194 Ark. 652, 109 S.W.2d 123 (1937) (decision under prior law).

#### **Sale of Land.**

Jurisdiction for the sale of deceased's land is only in the probate court of the county in which the personal representative was qualified, not in another county in which the land may be located. *Gordon v. Howell*, 35 Ark. 381 (1880) (decision under prior law).

#### **Void Administrator Appointment.**

Where deceased did not live or die in the county where administrator was appointed, the appointment was void and a judgment obtained by the administrator against a corporation wrongfully causing the death of the deceased was properly set aside. *Groschner v. Winton*, 146 Ark. 520, 226 S.W. 162 (1920) (decision under prior law).

**Cited:** *Odom v. Travelers Ins. Co.*, 174 F. Supp. 426 (W.D. Ark. 1959); *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004).

### **28-40-103. Time limit for probate and administration.**

(a) No will shall be admitted to probate and no administration shall be granted unless application is made to the court for admission to probate within five (5) years from the death of the decedent, subject only to the exceptions stated in this section.

(b) This section shall not affect the availability of appropriate equitable relief against a person who has fraudulently concealed or participated in the concealment of a will.

(c)(1) Insofar only as it relates to real property in Arkansas, or any interest in real property, the will of a nonresident which has been admitted to probate in another appropriate jurisdiction may be admitted to probate in this state without regard to the time limit imposed by this section.

(2) However, rights and interests in the real property which, after the death of the testator if it is assumed that he or she died intestate, have been acquired by purchase, as evidenced by one (1) or more appropriate instruments which have been properly recorded in the office of the recorder of the county in which the real property is situated and which would be valid and effective had the decedent died intestate, shall not be adversely affected by the probate of the will in this state after the expiration of the time limit imposed by subsection (a) of this section.



**History.** Acts 1949, No. 140, § 64; 1963, No. 166, § 1; A.S.A. 1947, § 62-2125.

## CASE NOTES

### ANALYSIS

In General.  
Applicability.  
Application to Court.  
Estoppel.  
Later Will as Counterclaim.  
Nonresident's Will.  
Oversight of Clerk.  
Probate Barred.  
Provisions Not Retroactive.  
"Purchase" Construed.

#### **In General.**

This section not only limits to five years the time in which a will may be admitted to probate, but also limits to five years the time in which letters of administration may be granted. *Horn v. Horn*, 226 Ark. 27, 287 S.W.2d 586 (1956).

#### **Applicability.**

Proponent of the will of a person who died before the effective date of this section did not have a vested right to probate the will more than five years after the effective date of this section. *Horn v. Horn*, 226 Ark. 27, 287 S.W.2d 586 (1956).

The will of person who died more than five years before the effective date of this section could not be probated more than five years after the effective date of this section. *Horn v. Horn*, 226 Ark. 27, 287 S.W.2d 586 (1956).

This section and § 28-9-209 are not applicable in a paternity case; paternity action must be commenced in chancery court because it is not a determination of heirship. *In re Estate of F.C.*, 321 Ark. 191, 900 S.W.2d 200 (1995).

#### **Application to Court.**

An application to the court within the meaning of this section was made when proponents of a will filed a verified petition for probate within three days after death of the testator, and a personal appearance before the probate court was not necessary. *Minchew v. Tullis*, 236 Ark. 818, 368 S.W.2d 282 (1963).

#### **Estoppel.**

Where the widow of a deceased invoked the aid of a court to permit her to serve as

administrator, although her first request for appointment was after expiration of period for probating will, she could not later complain that the court was without the power to make such an appointment. *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959).

#### **Later Will as Counterclaim.**

Where deceased had two wills, one being probated, and the later will was offered for probate more than five years after testator's death, the later will was barred by this section despite the contention it was offered as a counterclaim and therefore not subject to this section. *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975).

#### **Nonresident's Will.**

This section, which limits the period within which a will may be admitted to probate to five years from the testator's death, applies to a nonresident's will which has been admitted to probate in a foreign jurisdiction. *Sims v. Schavey*, 234 Ark. 166, 351 S.W.2d 145, 87 A.L.R.2d 718 (1961).

#### **Oversight of Clerk.**

Where a will, together with the necessary proof of its execution, was filed with the probate clerk in 1947, but the clerk failed to enter an order admitting the will to probate, the party had fully complied with the requirements of former provisions for the probate of the will, notwithstanding the oversight of the clerk, and it was not barred by the subsequently enacted statute of limitation contained in this section. *Muldrew v. Dodson*, 237 Ark. 852, 376 S.W.2d 672 (1964) (decision under prior law).

The time limit of this section did not apply to prevent the probate of a will which, together with necessary proof of its execution, had been filed with the probate clerk in 1947 under repealed § 60-209, but where the clerk had failed to enter an order admitting it to probate. *Muldrew v. Dodson*, 237 Ark. 852, 376 S.W.2d 672 (1964) (decision under prior law).

**Probate Barred.**

Former limitations period in effect prior to the 1963 amendment of this section barred probate of decedent's will because she died in 1962, and the five-year period from her death had passed. *Delafield v. Lewis*, 299 Ark. 50, 770 S.W.2d 659 (1989).

**Provisions Not Retroactive.**

Proceeding in 1950 to probate will of person who died in 1935 was not barred by five year limitation period contained in the 1949 Code, since the Probate Code is not retroactive. *Hudson v. Hudson*, 219 Ark. 211, 242 S.W.2d 154 (1951).

**"Purchase" Construed.**

Where oil, gas, and mineral interests were deeded from grandchild to her aunt several weeks before will was offered to

probate in Louisiana, but that will was not offered for probate in Arkansas until 10 years later, the fact that the granddaughter may have had notice of the existence of the will before her conveyance did not cause the conveyance not to be qualified as a "purchase" under subsection (c) of this section and thus foreclose the admission of the will to probate despite the expiration of the five-year period under this section, since the phrase "purchase" as used in subsection (c) of this section does not mean or imply a bona fide purchaser without notice. *Cooper v. Tosco Corp.*, 272 Ark. 294, 613 S.W.2d 831 (1981).

**Cited:** *Blair v. Bradley*, 238 Ark. 191, 379 S.W.2d 5 (1964); *Johnson v. Johnson*, 292 Ark. 536, 732 S.W.2d 121 (1987).

## **28-40-104. No will effectual until probated — Unprobated wills admitted as evidence.**

(a) No will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate.

(b) Except as provided in § 28-41-101, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of probate by the circuit court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:

(1) No proceeding in circuit court concerning the succession or administration of the estate has occurred; and

(2) Either the devisee or his or her successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

(c) The provisions of subsections (b) and (c) of this section shall be supplemental to existing laws relating to the time limit for probate of wills, and the effect of unprobated wills, and shall not be construed to repeal § 28-40-103 and subsection (a) of this section or any other law not in direct conflict herewith.

**History.** Acts 1949, No. 140, § 65; 1981, No. 347, §§ 1, 2; A.S.A. 1947, §§ 62-2126 — 62-2126.2.

## **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Legislative Survey, Decedents' Estates, 4 U. Ark. Little Rock L.J. 591.



## CASE NOTES

## ANALYSIS

Purpose.

Applicability.

Delay in Closing Estate.

Evidence of Devise to Remainderman.

Possession of Property.

Small Estates.

**Purpose.**

The intent of subsections (b) and (c) was not to alter existing laws affecting the timely probate of wills in order to give effect to their provisions, but to evidence a claim of ownership by one who has been in possession of property consistent with the terms of an unrevoked will which was not probated. *Johnson v. Johnson*, 292 Ark. 536, 732 S.W.2d 121 (1987).

**Applicability.**

Actual possession, rather than constructive possession, is contemplated for subsection (b) to apply. *Johnson v. Johnson*, 292 Ark. 536, 732 S.W.2d 121 (1987).

Trial court did not err when it found that, under subdivision (b)(2) of this section, a niece was the owner of the content's of her deceased uncle's safety deposit box where, even though his will had not been probated, a copy of his unprobated will named her as sole beneficiary; the situation fit within the parameters of subsection (b)(2), which thus allowed evidence of the testator's intention and provided the evidence that supported the trial court's conclusion that niece was the owner of the box contents. *Atkinson v. Knowles*, 82 Ark. App. 224, 105 S.W.3d 818 (2003).

**Delay in Closing Estate.**

Where chancellor gave effect to the provisions of will which had been admitted to probate in 1936, since the will was filed and admitted to probate in a timely manner, and there were no inequities resulting from the unusual delay in closing the estate, there was no reason to disturb the chancellor's decision giving full effect to the will. *Blundell v. Estate of Cox*, 297 Ark. 320, 760 S.W.2d 872 (1988).

**Evidence of Devise to Remainderman.**

Where the testator's duly executed will, though never probated, remained unre-

voked, where there had been no administration of the estate, and where the testator's devisee for life had possessed the property until his death, the will was properly admitted as evidence of the devise of the testator's property to the remainderman. *Smith v. Ward*, 278 Ark. 62, 643 S.W.2d 549 (1982).

**Possession of Property.**

A decedent's unprobated, duly executed, and nonrevoked will was properly admitted as evidence of devise of farm property since devisees under the will met the requirement of actual possession, notwithstanding that they did not physically possess the property, where (1) the devisees made the tenant aware that they owned the land and that they intended to continue the arrangement the tenant had with the decedent, (2) they conferred with the tenant about what crops to grow and the operation of the farm, (3) they visited the farm two or three times a year, (4) they signed a power of attorney and completed government documents, (5) they received subsidies from the government, and one-third of the profits generated by the tenant as rent, (6) as the will provided, they split the costs and income of the property evenly, (7) they also split the costs of expenses, insurance, real estate taxes, and levee taxes, and (8) when a bridge on the property collapsed, they posted no trespassing notices and blocked access to the bridge. *Songer v. Wiggins*, 71 Ark. App. 152, 27 S.W.3d 755 (2000).

**Small Estates.**

Circuit court erred in granting the declaratory judgment in favor of the heirs and ordering the decedent's land to be sold and the proceeds divided accordingly, where the circuit court's ruling was based on an erroneous interpretation and application of this section; because the small-estate procedure was excepted from the requirements of this section and § 28-41-101, the issue of whether the beneficiary commenced a probate proceeding was irrelevant. *Osborn v. Bryant*, 2009 Ark. 358, 324 S.W.3d 687 (2009).

**Cited:** *Odom v. Travelers Ins. Co.*, 174 F. Supp. 426 (W.D. Ark. 1959); *Rachel v. Johnson*, 230 Ark. 1003, 328 S.W.2d 87 (1959); *Delafield v. Lewis*, 299 Ark. 50, 770 S.W.2d 659 (1989).

**28-40-105. Delivery of will by custodian.**

(a) After the death of a testator, the person having custody of his or her will shall deliver it to the court which has jurisdiction of the estate or to the executor named in the will.

(b)(1) Upon the written motion of an interested person, the clerk shall issue a citation against any person who is alleged to possess the will of a testator directing that the alleged will be produced at a time specified in the citation.

(2) A person who willfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He or she shall also be liable to any aggrieved party for damages which may be sustained by such a refusal or failure.

**History.** Acts 1949, No. 140, § 42;  
A.S.A. 1947, § 62-2103.

**CASE NOTES****Jurisdiction of Probate Court.**

Where a will provided for a trust under the supervision of the chancery court, which assumed administration of the trust, the probate court had jurisdiction to determine whether bequest under the will was payable since it was concerned with administration of the estate, but it did not have jurisdiction to determine whether petitioner had right to rents and possession of trust lands since that involved administration of the trust under supervision of the chancery court. *Cross v.*

*McLaren*, 223 Ark. 674, 267 S.W.2d 956 (1954).

Executor of decedent's will was not required to deliver the will to the proper court where he was the named executor of the will; further, under § 28-40-107, an illegitimate child who had never been declared legitimate did not qualify as an interested person within the Probate Code who was required to receive notice. *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

**28-40-106. Powers of nominated executor prior to appointment.**

(a) Prior to the probate of the will and granting of letters testamentary, a person nominated in the will to be executor may take such steps as are reasonably necessary in the management and preservation of the property and rights of the decedent and, subject to the prior rights of members of the immediate family of the decedent, may arrange for his or her burial.

(b)(1) If the court refuses to admit the proffered will to probate or the person shall not qualify as executor, he or she shall not be liable for his or her acts done in good faith and for which he or she would not be liable had he or she been the lawful executor.

(2) However, promptly upon the appointment of a personal representative, the person shall account to the personal representative for steps taken and acts performed by him or her and deliver to the personal representative any assets of the estate which have come into his or her hands.



**History.** Acts 1949, No. 140, § 43;  
A.S.A. 1947, § 62-2104.

### CASE NOTES

#### ANALYSIS

Authority of Executor.  
Executor De Son Tort.  
Intermeddling.  
Powers Before Qualification.  
Sue or Be Sued.

#### Authority of Executor.

A will, though fully proven and established, confers no power on an executor other than for the burial of the deceased and the preservation of his estate; the authority of the executor to act as such is derived from the letters testamentary, and his appointment must be confirmed by a probate court. *Diamond v. Shell*, 15 Ark. (2 Barber) 26 (1854) (decision under prior law).

#### Executor De Son Tort.

In Arkansas, an executor de son tort, as at common law, is unknown. *Rust v. Witherington*, 17 Ark. (4 Barber) 129 (1856) (decision under prior law).

#### Intermeddling.

One who intermeddles without authority in the estate of a deceased person is responsible to the rightful executor and not to a creditor. *Barasien v. Odum*, 17 Ark. (4 Barber) 122 (1856) (decision under prior law).

#### Powers Before Qualification.

An executor's powers before qualification are limited to the burial of the deceased and the preservation of his estate; if before then he intermeddles with the estate, his subsequent qualification legalizes his tortious act, making him liable to those interested in the estate and protecting the party with whom he deals. *McDearmon v. Maxfield*, 38 Ark. 631 (1882) (decision under prior law).

#### Sue or Be Sued.

Nothing in this section authorizes a personal representative to sue or be sued until such time as he has received letters of administration. *Jenkins v. Means*, 242 Ark. 111, 411 S.W.2d 885 (1967).

### 28-40-107. Petition for probate and appointment of personal representative.

(a) An interested person may petition the court of the proper county:  
(1) For the admission of the will to probate, although it may not be in his or her possession or may be lost, destroyed, or outside the state;  
(2) For the appointment of executor if one is nominated in the will;  
(3) For the appointment of an administrator if no executor is nominated in the will or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will.

(b) A petition for probate may be combined with a petition for the appointment of an executor or administrator. A person interested in either the probate of the will or the appointment of a personal representative may petition for both.

(c) A petition for probate of a will or for the original appointment of a general personal representative, or for both, shall state:

(1) The name, age, residence, and date and place of death of the decedent;

(2) The names, ages, relationships to the decedent, and residence addresses of the heirs and devisees, if any, so far as they are known or can with reasonable diligence be ascertained;

(3) The probable value, stated separately, of the real and of the personal property;

(4) If the decedent did not reside in the state at the time of his or her death, a general description of the property situated in each county in this state and the value thereof;

(5) If the venue is based upon § 28-40-102(a)(4), the facts establishing the venue;

(6) If the decedent died testate and the will is not filed, the contents of the will, either by attaching a copy of it to the petition or, if the will is lost, destroyed, or suppressed, by including a statement of the provisions of the will so far as known;

(7) The names and residence addresses of the persons, if any, nominated as executors; and

(8) If the appointment of a personal representative is sought, the name and residence address of the person for whom letters are prayed, his or her relationship to the decedent, or other facts, if any, which entitle the person to appointment.

**History.** Acts 1949, No. 140, §§ 44, 45;  
A.S.A. 1947, §§ 62-2105, 62-2106.

## CASE NOTES

### ANALYSIS

Appointment of Executor.

Compliance with Statutory Provisions.

#### Appointment of Executor.

The probate judge did not abuse her discretion in finding that the decedent's sister was unsuitable to serve in the position of executrix, in light of her simultaneous role as executrix of the decedent's late wife's estate. *Burch v. Griffe*, 342 Ark. 615, 29 S.W.3d 726 (2000).

Circuit court erred in appointing appellee as the administratrix of the decedent's estate because appellee was not an "interested person" under the relevant statutes with standing to petition the probate court. *Lucas v. Wilson*, 2011 Ark. App. 584, — S.W.3d — (2011).

#### Compliance with Statutory Provisions.

The notation of the clerk on the reverse side of a will showing the filing, followed

by a notation of the judge approving "the action of the clerk admitting the will to probate" was substantial compliance with former statute admitting the will to probate. *Holliday v. Phillips Petroleum Co.*, 275 F. Supp. 686 (E.D. Ark. 1967) (decision under prior law).

Executor of decedent's will was not required to deliver the will to the proper court under § 28-40-105 because he was the named executor of the will; further, an illegitimate child who had never been declared legitimate did not qualify as an interested person within the Probate Code who was required to receive notice. *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006).

**Cited:** *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

## 28-40-108. Requests for notices.

(a)(1) If an interested person desires to be notified before a will is admitted to probate or before a general personal representative is appointed, he or she may file with the clerk a demand for notice.



(2) A demand for notice is not effective unless it contains a statement of the interest of the person filing it and his or her address or that of his or her attorney.

(3) After filing the demand, no will shall be admitted to probate and no personal representative shall be appointed, other than a special administrator, until the notice provided in § 28-40-110 has been given.

(b)(1) At any time after the issuance of letters, any person interested in the estate may serve, in person or by attorney, upon the personal representative or upon his or her attorney and file with the clerk of the court where the proceeding is pending, with a written admission or proof of service, a written request stating that he or she desires written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, by rule of court, or by an order in the particular case.

(2) The applicant for such a notice must include in his or her written request his or her post office address and that of his or her attorney, if any.

(3) Unless the court otherwise directs, after the request has been filed, the person shall be entitled to notice of all hearings for which any notice is required as aforesaid or of such hearings as he or she designates in his or her request.

**History.** Acts 1949, No. 140, §§ 46, 47;  
A.S.A. 1947, §§ 62-2107, 62-2108.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notices under the Probate Code, 8 Ark. L. Rev. 324.

## CASE NOTES

### ANALYSIS

Claims Disallowed.  
Complaints by Heirs.

#### Claims Disallowed.

Where claimant filed a claim against the estate of the deceased more than six months after the first notice to creditors, but less than six months after the heirs had filed their waivers of notice, the claim was properly disallowed. *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963).

#### Complaints by Heirs.

If the heirs feel aggrieved at any action taken or are of the view that some right has been denied them because no notice was given them, they have the prerogative (under certain circumstances) to complain. *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963).

**Cited:** *Wilson v. Davis*, 239 Ark. 305, 389 S.W.2d 442 (1965).

**28-40-109. Hearing on petition without notice.**

Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in § 28-40-108, and if such a petition is not opposed by an interested person, the court in its discretion may hear it immediately or at such time and place as it may direct without requiring notice.

**History.** Acts 1949, No. 140, § 48;  
A.S.A. 1947, § 62-2109.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Notices under the Probate Code, 8 Ark. L. Rev. 324.

**CASE NOTES**

**Claims Disallowed.**

Where claimant filed a claim against the estate of the deceased more than six months after the first notice to creditors but less than six months after the heirs had filed their waivers of notice, the claim

was properly disallowed. *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963).

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

**28-40-110. Notice of hearing on petitions.**

(a) If the petition for probate or for the appointment of a general personal representative is opposed, or if a demand for notice has been filed under the provisions of § 28-40-108, the court shall, and in all other cases the court may, fix a time and place for a hearing on the petition.

(b) Notice of the hearing shall be given by one (1) or more of the methods set out in § 28-1-112 to each heir and devisee whose name and address is given, including notice other than by publication to each person who has filed demand for notice.

(c) If it appears by the petition or otherwise that the fact of the death of the person whose estate is to be administered may be in doubt, or on the written demand of an interested person, a copy of the notice of the hearing on the petition shall be sent by registered mail to the last known residence address of the alleged decedent.

(d) The notice required by this section shall be in substantially the following form:

In the Circuit Court of ..... County, Arkansas.  
Estate of ..... , deceased.

To all persons interested in the Estate of .....  
(and to the said ..... , if he be not deceased):

You are hereby notified that a petition has been filed in this court (to admit to probate the will of ....., and) for the appointment of a personal representative for said estate; that said petition will be heard at ....o'clock at .... on the .... day of ....., 20..., or at such subsequent



time or other place to which said hearing may be adjourned or transferred.

Date .....

Probate Clerk of the Circuit Court of  
..... County, Arkansas

**History.** Acts 1949, No. 140, § 49;  
A.S.A. 1947, § 62-2110; Acts 2003, No.  
1185, § 277.

### RESEARCH REFERENCES

**Ark. L. Rev.** Notices under the Probate  
Code, 8 Ark. L. Rev. 324.

### CASE NOTES

#### **Duty to Give Notice.**

It was the duty of an executor or administrator, at his official peril, to give the notice to creditors required by former statute, but this duty was not a condition precedent to the exhibition of claims within the required period. *Bennett v.*

*Dawson*, 15 Ark. (2 Barber) 412 (1855) (decision under prior law).

**Cited:** *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963); *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979); *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).

### **28-40-111. Notice of appointment of personal representative.**

(a)(1)(A) Promptly after the letters have been granted on the estate of a deceased person, the personal representative shall cause a notice of his or her appointment to be published stating the date of his or her appointment and requiring all persons having claims against the estate to exhibit them, properly verified to him or her, within six (6) months from the date of the first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate.

(B) Claims for injury or death caused by the negligence of the decedent shall also be filed within six (6) months from the date of first publication of the notice, or they shall be forever barred and precluded any benefit in the estate.

(2) The notice shall state the mailing address of the personal representative.

(3) If a will of the decedent has been probated, the notice shall also state the date of admission of the will to probate and that a contest of the order of probate can be effected only by filing a petition within the time provided by law.

(4)(A) Within one (1) month after the first publication of the notice, a copy of the notice shall also be served upon each heir and devisee whose name and address are known and upon all unpaid creditors whose names, status as creditors, and addresses are known to or reasonably ascertainable by the personal representative, including the Department of Human Services if it is known or could reasonably be ascertained that the department has rendered services to the

decedent, in accordance with § 28-1-112(b)(1), § 28-1-112(b)(2), or § 28-1-112(b)(3).

(B)(i) Notice to the department shall be served upon the Office of Chief Counsel, Decedent’s Estates, P.O. Box 1437, Little Rock, AR 72203.

(ii) A copy of the petition for probate of a will or administration of an estate and the decedent’s social security number shall be attached to the notice served upon the department.

(C)(i) If, thereafter, the names and addresses of any such creditors are ascertained, a copy of the notice shall be promptly served upon them.

(ii) The burden of proof on any issue as to whether a creditor was known to or reasonably ascertainable by the personal representative shall be upon the creditor claiming entitlement to such actual notice.

(b) When a will is to be probated without an administration of the estate, the notice shall be published by the proponents of the will and shall state the mailing address of each of the one (1) or more proponents and the name and address of the attorney for the proponents.

(c) The notice shall be in substantially the following form:  
“In the Circuit Court of .....County, Arkansas  
In the Matter of the Estate of ....., Deceased. No .....  
Last known address .....  
Date of death .....

(1) (To be used where no will.)

The undersigned was appointed administrator of the estate of the above decedent on the .... day of ....., 20....

(2) (To be used when a will is probated and a personal representative appointed.)

An instrument dated .....was on the ....day of ....., 20...., admitted to probate as the last will of the above named decedent and the undersigned has been appointed executor (or administrator) thereunder. Contest of the probate of the will can be effected only by filing a petition within the time provided by law.

(3) (To be used when a will is probated but no personal representative appointed.)

An instrument dated .....was on the ....day of ....., 20...., admitted to probate as the last will of the above named decedent. Contest of the probate of the will can be effected only by filing within the time provided by law a petition for an order revoking or modifying the order admitting the will to probate, and delivering a copy of such petition to the undersigned proponent(s) or the undersigned attorney for the proponent(s) at his (their) address hereunder shown.

(4) (To be used in cases where a personal representative is appointed.)

All persons having claims against the estate must exhibit them, duly verified, to the undersigned within six (6) months from the date of the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate.



This notice first published ....., 20....  
.....  
(Administrator, Executor, Proponent, or Petitioner)  
.....  
(Mail Address)”

(d)(1) Publication of the notice shall be as provided in § 28-1-112(b)(4) unless the value of the estate to be administered upon does not exceed one thousand dollars (\$1,000), exclusive of homestead, in which event publication may be given by posting notice in the courthouse at a conspicuous place near a principal entrance for a period of three (3) weeks.

(2) In addition, the court may by general rule, or by special order in a particular case, require that notice shall be given by ordinary mail to all persons whose names and addresses appear in the petition.

**History.** Acts 1949, No. 140, § 50; 1953, No. 32, § 1; 1967, No. 287, § 1; 1985, No. 1007, § 1; A.S.A. 1947, § 62-2111; Acts 1987 (1st Ex. Sess.), No. 16, § 1; 1989, No. 929, § 2 [1]; 1989 (3rd Ex. Sess.), No. 59, § 1; 1993, No. 415, § 2; 2009, No. 217, § 1.

**A.C.R.C. Notes.** Acts 1987 (1st Ex. Sess.), No. 16, § 2, provided that this act shall be applicable to estates where administration is pending on June 12, 1987, and that if any notice required by this act has not previously been given by the personal representative, the personal representative shall give such notice within 90 days from June 12, 1987, if the claims of persons to receive notice are not barred by

the expiration period set forth in § 28-50-101.

**Amendments.** The 2009 amendment substituted “six (6) months” for “three (3) months” in (a)(1)(A) and the second paragraph of (c)(4); substituted “Circuit” for “Probate” in the line following the introductory language in (c); deleted the last sentence in the second paragraph of (c)(4), which read: “However, claims for injury or death caused by the negligence of the decedent shall be filed within six (6) months from the date of first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate”; and made stylistic and minor punctuation changes.

RESEARCH REFERENCES

**Ark. L. Rev.** Amendments of the Probate Code, 7 Ark. L. Rev. 377.  
Notices under the Probate Code, 8 Ark. L. Rev. 324.  
Panel on Experience under the Arkansas Probate Code, 12 Ark. L. Rev. 40.  
Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.  
Note, The Requirement of Notice in Probate Proceedings: Recent Changes in Arkansas Law, 43 Ark. L. Rev. 945.

**U. Ark. Little Rock L.J.** Legislative Survey, Probate, 8 U. Ark. Little Rock L.J. 597.  
Note, Probate — Satisfying the Due Process Requirement of Actual Notice to Estate Creditors, Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340, 485 U.S. 478, 99 L. Ed. 2d 565 (1988), 11 U. Ark. Little Rock L.J. 603.

## CASE NOTES

## ANALYSIS

Construction.

Claims Disallowed.

Persons Entitled to Receive Notice.

Petition to Set Aside Will.

**Construction.**

A creditor of an estate must be subject to identification during the three month (now six (6) months) statute of nonclaim, § 28-50-101(a); if this were not the case, then all matters of estate would be left open for two years under § 28-50-101(h) and subsection (a) of this section, which was certainly not the intent of the legislature. *Brasel v. Estate of Harp*, 317 Ark. 379, 877 S.W.2d 923 (1994).

**Claims Disallowed.**

Where claimant filed a claim against the estate of the deceased more than six months after the first notice to creditors, but less than six months after the heirs had filed their waivers of notice, the claim was properly disallowed. *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963) (decision under prior law).

**Persons Entitled to Receive Notice.**

There is no requirement of notice of estate proceedings to parties who have no

direct interest in decedents' estates, and those parties do not have standing to enter to the estate proceeding or to raise the issue whether decedents' offspring, who had been convicted of manslaughter in their death, could inherit from their estate. *Kimrey v. Booth*, 285 Ark. 18, 685 S.W.2d 139 (1985).

**Petition to Set Aside Will.**

Where brothers of testator were not given notice of the admission of the will to probate in the manner required by this section, but were mentioned as heirs in the petition to probate, their petition to set aside the will filed six months and 13 days after the admission of the will to probate was filed in time under subsection (b)(2)(C) of § 28-40-113. *Jones v. Jones*, 234 Ark. 163, 350 S.W.2d 673 (1961) (decision under prior law).

**Cited:** *Brickey v. Lacy*, 247 Ark. 906, 448 S.W.2d 331 (1969); *Gibbins v. Hancock*, 267 Ark. 298, 590 S.W.2d 280 (1979); *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988); *In re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993).

**28-40-112. Search for alleged decedent.**

Whenever there is reasonable doubt that the person whose estate is to be administered is dead, the court, upon application of an interested person, may direct the personal representative to make search for the alleged decedent in any manner which the court may deem advisable, including, but not limited to, any or all of the following methods:

(1) By inserting in one (1) or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent; or

(3) By engaging the services of an investigating agency.

**History.** Acts 1949, No. 140, § 51; A.S.A. 1947, § 62-2112.



**RESEARCH REFERENCES**

**Ark. L. Rev. Note**, the Requirement of Changes in Arkansas Law, 43 Ark. L. Rev. Notice in Probate Proceedings: Recent 945.

**28-40-113. Contest of will generally.**

(a) An interested person may contest the probate of a will, or any part thereof, by stating in writing the grounds of his or her objection and filing them in the court.

(b) No will can be contested unless the grounds of objection are filed within the periods hereinafter provided:

(1) If the ground of objection is that another will of the decedent has been discovered, the ground of objection must be filed before final distribution of the estate is ordered and within the period stated in § 28-40-103;

(2) If the contest is on any other ground and if the contestant or the person through whom he or she derives his or her interest in the estate:

(A) Has been given notice, other than by publication, of the hearing of a petition for probate as provided in § 28-40-110, his or her grounds for objection must be filed at or prior to the time of the hearing on the petition for probate;

(B) Has been notified of the admission of the will to probate in the manner provided by § 28-40-111 and is not barred by subdivision (b)(2)(A) of this section, his or her grounds of objection must be filed within three (3) months after the date of the first publication of the notice of the admission of the will to probate;

(C) Is not barred by the provisions of subdivision (b)(2)(A) or (B) of this section, but notice of the admission of the will to probate has been published as provided in § 28-40-111, whether or not published promptly, and a copy thereof has been served upon the contestant or the person through whom he or she derives his or her interest in the estate in accordance with § 28-1-112(b)(1), (2), or (3), the contestant must file his or her grounds for objection to the probate of the will within three (3) months after the first publication of notice of the probate or within forty-five (45) days after a copy of the notice was served upon him or her or his or her predecessor in interest in the estate, whichever period shall last expire; and

(D) Is not barred by any of the provisions of subdivision (b)(2)(A), (B), or (C) of this section, his or her grounds for objection must be filed within three (3) years after the admission of the will to probate; and

(3) The grounds for objection to a foreign will which has been admitted to probate in this state must be filed within the same time as though it were a will of a resident of this state, or thereafter within forty-five (45) days after the rendition of an order of a court of competent jurisdiction in the state of the domicile of the decedent, setting aside the probate of the will therein.

**History.** Acts 1949, No. 140, §§ 52, 53; 1985, No. 1007, § 2; A.S.A. 1947, §§ 62-1951, No. 255, § 4; 1967, No. 287, § 2; 2113, 62-2114.

## RESEARCH REFERENCES

**Ark. L. Notes.** Sampson, Burden Shifting in Will Contest Cases: An Examination and a Proposal that the Arkansas Supreme Court Reconcile Arkansas Rules of Evidence Rule 301 with its Undue Influence Case Law, 1996 Ark. L. Notes 87.

**Ark. L. Rev. Probate Code Amendments**, 5 Ark. L. Rev. 377. *Jackson v. Braden*, 290 Ark. 117, 717 S.W.2d 206 (1986).

## CASE NOTES

## ANALYSIS

Burden of Proof.  
Consolidation of Contests.  
Construction and Interpretation.  
Contest Barred by Limitations.  
Full Faith and Credit.  
Grounds for Contest.  
Interested Persons.  
Jurisdiction.  
Petition by Minors.  
Pretermitted Children.  
Review of Circuit Court Decision.  
Review of Probate Court Decision.  
Review of Circuit Court Decision.  
Setting Aside for Fraud.  
Timely Filing.  
Triggered No Contest Clause.

**Burden of Proof.**

When surviving son offered a will for probate, he had the burden of proving the genuineness of the signatures; he made such proof, and the will was admitted to probate. When other persons sought to contest the will, they had the burden of sustaining the contest on the alleged ground that the signatures to the will were a forgery. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

Substantial evidence supported a probate court finding that testator's first wife, who claimed a dower interest in estate, had not carried the burden of proving invalidity of second marriage merely by showing validity of her marriage to deceased and the absence of any court record of divorce in any one of three counties of her state, as valid divorce could have been granted elsewhere. *Miller v. Miller*, 237 Ark. 66, 371 S.W.2d 511 (1963).

The party contesting the validity of the will has the burden of proving by the preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the

testator acted under undue influence. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996).

**Consolidation of Contests.**

Where five separate contests of a will were appealed from the probate court to the circuit court, they were properly consolidated for trial as a single case. *First Nat'l Bank v. Ary*, 180 Ark. 1084, 24 S.W.2d 336 (1930) (decision under prior law).

**Construction and Interpretation.**

If the instrument offered was a will, it was to be admitted to probate, and its construction and interpretation were to be left to other courts having jurisdiction of the matter. *Powell v. Hayes*, 176 Ark. 660, 3 S.W.2d 974 (1928) (decision under prior law).

**Contest Barred by Limitations.**

Where no attack was made on a will within six months after it was duly probated and notice thereof published, the plaintiff was barred by limitations from contesting it. *Montgomery v. Blankenship*, 217 Ark. 357, 230 S.W.2d 51, 21 A.L.R.2d 212 (1950) (decision under prior law).

**Full Faith and Credit.**

The will of a person who had a domicile in another state in which the will was probated, insofar as it related to the devolution of either real or personal property in this state, could be contested, provided that full faith and credit had to be given by each state to the public acts, records, and judicial proceedings of every other state. *Schweitzer v. Bean*, 154 Ark. 228, 242 S.W. 63 (1922) (decision under prior law).

**Grounds for Contest.**

A party interested in the probate of the will of a nonresident could contest the probate upon the grounds of incapacity or



undue influence. *Selle v. Rapp*, 143 Ark. 192, 220 S.W. 662, 13 A.L.R. 494 (1920) (decision under prior law).

Pursuant to subsection (b), if a will contest was on any ground other than that another will had been discovered, and if the will contestant had been given proper notice, the contestant's grounds for objection had to be filed at or prior to the time of the hearing on the petition for probate; this section does not allow a party to make an oral objection to a will such that, while all the beneficiaries may not have been properly served, they had constructive and actual notice of the probating of the will. *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003).

### **Interested Persons.**

While, in a will contest, it would have been better practice to determine, as a preliminary question, the interest of any contestant whose right to sue as heir was disputed, the court could, in its discretion, submit to the jury this question, together with the main issue. *Flowers v. Flowers*, 74 Ark. 212, 85 S.W. 242 (1905) (decision under prior law).

Brothers and sisters of testator, who left surviving him heir in person of adopted son, were not "interested" persons, entitled to sue to set aside testator's will. *Hawkins v. Hawkins*, 218 Ark. 423, 236 S.W.2d 733 (1951).

Just any collateral heir is not necessarily an "interested person" with a right to contest the probate of a will under this section. *Mabry v. Mabry*, 259 Ark. 622, 535 S.W.2d 824 (1976).

Remote heirs, decedent's sister, nieces and nephew, were not "interested persons" entitled to contest a will under subsection (a) because they would not have taken by intestate succession at that time since decedent's two daughters were still living. *Hardie v. Estate of Davis*, 312 Ark. 189, 848 S.W.2d 417 (1993).

A daughter of the decedent, who received an equal share under the will at issue, had standing to question the validity of the will, notwithstanding that her interest was not detrimentally affected by the will. *Barrera v. Vanpelt*, 332 Ark. 482, 965 S.W.2d 780 (1998).

### **Jurisdiction.**

Trial court had authority to consider a challenge to decedent's will subsequent to

a hearing at which it orally announced its decision to admit a purported will to probate because no written order had been entered and filed of record from the prior hearing; subsection (b) of this section was not applicable because the trial court never lost subject-matter jurisdiction and was free to hear additional evidence and to alter its decision upon further consideration of the facts and circumstances surrounding the will. *Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003), overruled in part, *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003).

### **Petition by Minors.**

A petition by a minor to set aside the probate of a will filed after statutory period had expired was properly dismissed, since no exception in favor of minors is provided for by this section. *Brown v. Hawkins*, 219 Ark. 239, 240 S.W.2d 863 (1951).

### **Pretermitted Children.**

The limitation contained in subsection (b)(2) of this section does not apply to an action by pretermitted children against the sole devisee of their father's will for partition of the real estate devised in the will. *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970).

### **Review of Circuit Court Decision.**

In a will contest pursuant to this section, admission of a testator's will to probate was proper because preponderance of the evidence supported the circuit court's finding that both sons had confidential relationships with the testator, that the testator had testamentary capacity when he executed his will, and that the will was not the result of undue influence. *Breckenridge v. Breckenridge*, 2010 Ark. App. 277, — S.W.3d — (2010).

### **Review of Probate Court Decision.**

A court of equity was not authorized to review the decision of the probate court upon the probate of a will where there had been no appeal to the circuit court. *Mitchell v. Rogers*, 40 Ark. 91 (1882) (decision under prior law).

After a probate court has probated a will, necessarily putting testamentary capacity in issue, equity has no jurisdiction to review this capacity, even though no jurisdictional objection is made, unless there is extrinsic fraud upon the probate

court because the Arkansas Constitution places exclusive probate jurisdiction in the probate court. *O'Dell v. Newton*, 224 Ark. 541, 275 S.W.2d 453 (1955).

Due deference will be given to the superior position of the probate judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996).

#### **Review of Circuit Court Decision.**

Trial court erred in finding that decedent's spouse and brother did not procure the will, and, as such, they were obligated to rebut the presumption of undue influence, however, nothing in the record suggested that their influence operated to override the decedent's discretion or destroy the decedent's free will, and a medical doctor and other disinterested witnesses testified that the decedent was of sound mind when decedent executed his will; thus, the trial court's error was harmless. *In re Estate of Garrett*, 81 Ark. App. 212, 100 S.W.3d 72 (2003).

#### **Setting Aside for Fraud.**

A judgment admitting a will to probate could not be set aside for fraud on ground that judgment was based on copy instead of original will, since representation was not extrinsic. *Blankenship v. Montgomery*, 218 Ark. 864, 239 S.W.2d 272 (1951).

A judgment admitting a will to probate could not be set aside on ground of fraud based on fact that counsel for proponents of will persuaded court to appoint executors without bond, since this was an intrinsic matter. *Blankenship v. Montgomery*, 218 Ark. 864, 239 S.W.2d 272 (1951).

A judgment admitting a will to probate could not be set aside for fraud on ground that mental incapacity of deceased was concealed from the court, since concealment related to intrinsic matter and did not constitute extrinsic fraud. *Blankenship v. Montgomery*, 218 Ark. 864, 239 S.W.2d 272 (1951).

A judgment admitting a will to probate could not be set aside on the ground that counsel for proponents had concealed from

the court the fact that a "living trust" was incorporated in will where reference to trust appeared on the face of the instrument, since fraud alleged was intrinsic. *Blankenship v. Montgomery*, 218 Ark. 864, 239 S.W.2d 272 (1951).

#### **Timely Filing.**

Where brothers of testator were not given notice of the admission of the will to probate in the manner required by § 28-40-111, but were mentioned as heirs in the petition to probate, their petition to set aside the will filed six months and 13 days after the admission of the will to probate was filed in time under subsection (b)(2)(C) of this section. *Jones v. Jones*, 234 Ark. 163, 350 S.W.2d 673 (1961) (decision prior to 1985 amendment).

Where petition to contest a will reached the county clerk and, though not filed separately, was placed in the case file of deceased's estate within the statutory period for filing, the petition was deemed timely filed under this section. *Edwards v. Brimm*, 236 Ark. 588, 367 S.W.2d 433 (1963).

#### **Triggered No Contest Clause.**

Trial court did not err in finding that appellant contested the will, and although appellant claimed that she never made a written objection to the will under subsection (a) of this section and thus she could not have challenged the will, the court disagreed; by submitting a second will for probate drafted a week after the first will, in appellant's handwriting and leaving the bulk of the estate to herself, appellant clearly challenged the validity of the first will and sufficient evidence supported the conclusion that appellant was not acting in good faith when she offered that will for probate, such that her actions triggered the no-contest clause in the will. *Seymour v. Biehlich*, 371 Ark. 359, 266 S.W.3d 722 (2007).

**Cited:** *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970); *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987); *Spicer v. Estate of Spicer*, 55 Ark. App. 267, 935 S.W.2d 576 (1996).



**28-40-114. Notice of contest.**

(a)(1) If a statement for grounds for objection to admitting the will to probate is filed before it has been admitted and the notice provided for in § 28-40-110 has been given, no further notice is necessary unless ordered by the court.

(2) If the notice provided for in § 28-40-110 has not been given, the notice therein provided for shall be given and shall further state that the will is being contested.

(b) If a statement of grounds for objection to admitting the will to probate is filed after the will has been admitted and within the time limitations stated in § 28-40-113, the court shall fix a time and place for hearing the grounds for objection, and notice shall be given to each heir and devisee whose place of residence is known and, if the grounds for contest include the presentation of another will, to each devisee and the executor nominated in the other will whose place of residence is known, and to such other persons as the court may direct.

(c) All persons notified as provided by § 28-40-110 or by this section shall be deemed parties to the proceeding for all purposes.

**History.** Acts 1949, No. 140, § 54;  
A.S.A. 1947, § 62-2115.

**CASE NOTES****Burden of Sustaining Contest.**

When surviving son offered a will for probate, he had the burden of proving the genuineness of the signatures; he made such proof, and the will was admitted to probate. When other persons sought to

contest the will, they had the burden of sustaining the contest on the alleged ground that the signatures to the will were a forgery. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

**28-40-115. Contest of will — Rights of persons acquiring interest in property prior to filing of objections.**

(a) If, prior to the filing of an objection to the probate of a will, real or personal property or any security interest therein is acquired for value by a purchaser from, or a lender to, the personal representative of the estate or a distributee or devisee of the property by the terms of a will, the purchaser or lender shall take title free of rights of any interested person in the estate and incurs no personal liability to the estate or to any interested person whether or not the distribution was proper or supported by court order.

(b)(1) This section protects a purchaser from, or lender to, a distributee, devisee, or personal representative who has executed a deed or security instrument to the purchaser or lender prior to the filing of objections to the will.

(2) To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee or devisee are the same person.

(c) Any properly recorded instruments conveying such property on which a state documentary fee is noted pursuant to §§ 26-60-101 — 26-60-103 and 26-60-105 — 26-60-112 shall be prima facie evidence that the transfer was made for value and shall not be adversely affected should a will be later set aside in the manner provided by law.

**History.** Acts 1949, No. 140, § 53; 1985, No. 1007, § 2; A.S.A. 1947, § 62-1951, No. 255, § 4; 1967, No. 287, § 2; 2114.

### RESEARCH REFERENCES

**Ark. L. Rev.** Haught, 1988 Update to view of Recent Developments in Arkansas the Arkansas Probate System: An Over- Probate Practice, 42 Ark. L. Rev. 631.

### CASE NOTES

#### **Jurisdiction.**

Trial court had authority to consider a challenge to decedent's will subsequent to a hearing at which it orally announced its decision to admit a purported will to probate; subsection (a) of this section was not applicable because no written order was entered after the hearing and, thus, there was no order permitting a will to probate to set aside. *Judkins v. Hoover*, 351 Ark.

552, 95 S.W.3d 768 (2003), overruled in part, *West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003).

**Cited:** *Negovanov v. Wensko*, 248 Ark. 1109, 455 S.W.2d 929 (1970); *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *Jackson v. Braden*, 290 Ark. 117, 717 S.W.2d 206 (1986); *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987).

### **28-40-116. Will subsequently presented for probate.**

(a) If, after a petition for the probate of a will or for the appointment of a general personal representative has been filed and before that petition has been heard, a petition for the probate of a will of the decedent not theretofore presented for probate is filed, the court shall hear both petitions together and determine what instruments, if any, should be admitted to probate or whether the decedent died intestate.

(b) If, after a will has been admitted to probate or after letters of administration have been granted, a petition for the probate of a will of the decedent not theretofore presented for probate is filed, the court shall determine whether the former probate or the former grant of letters should be revoked and whether the other will should be admitted to probate or whether the decedent died intestate.

(c) No will shall be admitted to probate under the provisions of this section unless it is presented for probate before the court orders or approves final distribution of the estate.

(d) When a will is presented for probate under the provisions of this section, the proceedings shall be deemed a part of the proceedings for probate or for administration already initiated.

(e) If notice by publication has been given as provided in § 28-40-110 or in § 28-40-111, no further notice by publication is necessary unless ordered by the court. However, notice of the hearing shall be given to each heir and to each devisee named and the executor nominated in this or in any other will offered for or admitted to probate whose place of



residence is known, and notice shall be given to such other persons as the court may direct.

**History.** Acts 1949, No. 140, § 55;  
A.S.A. 1947, § 62-2116.

### CASE NOTES

#### Appeal.

Probate cases are tried de novo on appeal. *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994).

**Cited:** *Coleman v. Coleman*, 257 Ark. 404, 520 S.W.2d 239 (1975); *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

#### 28-40-117. Proof of will.

(a) An attested will shall be proved as follows:

(1) By the testimony of at least two (2) attesting witnesses, if living at known addresses within the continental United States and capable of testifying; or

(2)(A) If only one (1) or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses.

(B) The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence.

(b) A holographic will shall be proved by the testimony of at least three (3) credible disinterested witnesses proving the handwriting and signature of the testator and such other facts and circumstances as would be sufficient to prove a controverted issue in equity.

(c) A will which has been lost or destroyed by accident or design of some person other than the testator shall be proved by evidence which would be competent and sufficient in a proceeding in equity for the establishment of the lost will. The will so established shall be set forth in the order establishing it.

(d) The provisions of this section as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate, and the due execution of the will may be proved by such other evidence.

**History.** Acts 1949, No. 140, §§ 56, 57;  
A.S.A. 1947, §§ 62-2117, 62-2118.

## RESEARCH REFERENCES

**Ark. L. Rev.** Proof of Wills, 9 Ark. L. Rev. 394.

Wills — Proof of Testamentary Intent in Holographic Codicils, 25 Ark. L. Rev. 376.

Wills — Validity of Signature for Holographic Wills, 28 Ark. L. Rev. 521.

## CASE NOTES

## ANALYSIS

Construction.

Acknowledgment by Testator.

Attorney as Attesting Witness.

Burden of Proof.

Evidence of Forgery.

Extrinsic Evidence.

Holographic Wills.

Lost or Destroyed Wills.

One Attesting Witness.

Proof of Execution.

Proof of Signatures.

Will Destroyed by Testator.

**Construction.**

Subsections (a)-(c) of this section and subsection (d) of this section are not contradictory, but should be read together in determining admissible evidence in a suit to probate will. *In re Alzheimer's Estate*, 221 Ark. 941, 256 S.W.2d 719 (1953).

**Acknowledgment by Testator.**

Once the signing of a will is proven by two attesting witnesses, and there is no suggestion of fraud or undue influence, there is a presumption that the testator declared to the attesting witnesses that the instrument was his will; and that he either signed in front of them or acknowledged to them his signature on the instrument; and that the attesting witnesses signed at the request of and in the presence of the testator. *In re Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (Ark. 1991).

**Attorney as Attesting Witness.**

An attorney who drafted a will and witnessed it, but who was not named in the will, was competent to testify as an attesting witness. *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963).

**Burden of Proof.**

When surviving son offered a will for probate, he had the burden of proving the genuineness of the signatures; he made

such proof, and the will was admitted to probate. When appellants sought to contest the will, they had the burden of sustaining the contest on the alleged ground that the signatures to the will were a forgery. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

**Evidence of Forgery.**

Although testimony as to signature on a will was conflicting where enlarged photographs of the admitted signature of the decedent made it apparent that the signature on the will was a forgery, the court properly refused to admit the will to probate. *Thomas v. Barnett*, 228 Ark. 658, 310 S.W.2d 248 (1958).

Where 11 witnesses stated that they were familiar with the signature and handwriting of the deceased and expressed their opinion that a proffered will was written entirely in the handwriting of the deceased, but court-appointed expert declared the will a forgery, the court's holding that the will was forged was not against the preponderance of the evidence. *Wilson v. Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

**Extrinsic Evidence.**

Extrinsic evidence may be admitted when it is necessary to fortify the finding of existence of testamentary intent. *Chambers v. Younes*, 240 Ark. 428, 399 S.W.2d 655 (1966).

**Holographic Wills.**

A credible witness to a holographic will is one who is competent and who is worthy of belief. *Sanders v. Abernathy*, 221 Ark. 407, 253 S.W.2d 351 (1952).

A trial court erred in denying probate of a holographic will on the ground that evidence presented did not meet requirements necessary to establish holographic will where four renters from deceased and two banking officials testified that will was in handwriting of the deceased. Sand-



ers v. Abernathy, 221 Ark. 407, 253 S.W.2d 351 (1952).

Members of a church were competent witnesses to establish holographic will benefiting the church where no gain from the will would inure to the members individually under the will. *Barnard v. Methodist Church*, 226 Ark. 144, 288 S.W.2d 595 (1956).

### **Lost or Destroyed Wills.**

Before a court will establish a will as being lost or destroyed, it must be shown that the will was duly executed. *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948) (decision under prior law).

### **One Attesting Witness.**

Where only one attesting witness to will can be produced, it is permissible to introduce testimony on the authenticity of the handwriting of other attesting witness. In *re Alzheimer's Estate*, 221 Ark. 941, 256 S.W.2d 719 (1953).

Where a witness to a will testified that she witnessed the will at the request of the testator and in the presence of the other attesting witness who was then deceased, but whose signature was identified by his son and his widow, this testimony met the requirement of this section for the testimony of "credible disinterested witnesses" and thus the will was sustained as an attested will. *Walpole v. Lewis*, 254 Ark. 89, 492 S.W.2d 410 (1973).

The trial court erred in admitting a will to probate because the proponent failed to prove the will by either two attesting witnesses or two credible disinterested witnesses, and there was no showing that any diligence was exercised in procuring the testimony of one of the attesting witnesses. *Carter v. Meek*, 70 Ark. App. 447, 20 S.W.3d 417 (2000).

### **Proof of Execution.**

Proper execution of a will to be probated could be proven by all or any one of the subscribing witnesses, or by only one witness who testified positively to the request of its execution and another witness did not recollect or denied some of the requests. *Leister v. Chitwood*, 216 Ark. 418, 225 S.W.2d 936 (1950) (decision under prior law).

The requirements outlined in subsection (a)(1) for proving an attested will by the testimony of two attesting witnesses were satisfied where (1) the two attesting

witnesses were credible disinterested witnesses, (2) each witness testified that his or her signature was on the will as an attesting witnesses, (3) one witness was able to provide testimony regarding the circumstances surrounding the decedent coming into his office and asking him to draft the will and later a codicil, and he also testified that he and his secretary routinely acted as witnesses to wills prepared for his clients and that they would not sign the document until the testator had signed the will and requested that they attest it, and (4) the other witness testified that she would not have acted as a witness to the will or codicil if they had not been properly executed. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001).

### **Proof of Signatures.**

Where the testator and both attesting witnesses were dead, all the contestants had to do was to prove that any one of the three signatures was a forgery, in order to defeat probate, since a valid will, other than holographic, must have two witnesses. *Ross v. Edwards*, 231 Ark. 902, 333 S.W.2d 487 (1960).

Where only one attesting witness testified that the will contained the signature of the testator and the other witness, the widow of the second attesting witness, only identified her husband's signature as an attesting witness without offering testimony regarding the signature of the testator, the requirements of this section were not met, and the probate judge correctly refused to admit the will to probate. *Children's Mercy Hosp. v. Chick*, 262 Ark. 520, 559 S.W.2d 3 (1977).

Trial court did not clearly err in finding that a will was witnessed by the appropriate number of witnesses and with the required formalities under this section where the will and the proof of will were signed by three witnesses, even though only two were required, and where the two living witnesses testified, along with the will's notary. Although the testimony was conflicting, the appellate court left to the trial court the weight to be given to the testimony of the witnesses. *Baxter v. Peters*, 2009 Ark. App. 807, — S.W.3d — (2009).

### **Will Destroyed by Testator.**

This section completely leaves out any procedure for establishing a will which

has been effectively destroyed by the testator; it does provide for the method of proving a will which has been lost or destroyed by accident or design of some person other than the testator. The only logical reason for not making provisions for proof of a will destroyed intentionally by a testator, in accordance with § 28-25-109, is obvious; there is no will to prove —

it has been legally and physically extinguished. *Parker v. Mobley*, 264 Ark. 805, 577 S.W.2d 583 (1979).

**Cited:** *Pennington v. Pennington*, 1 Ark. App. 311, 615 S.W.2d 391 (1981); *Upton v. Upton*, 26 Ark. App. 78, 759 S.W.2d 811 (1988); *Earney v. Sharp*, 312 Ark. 9, 846 S.W.2d 649 (1993).

### **28-40-118. Manner of taking testimony.**

(a) If the probate of a will is not contested, the testimony of the required witnesses may be taken by affidavit, unless the court shall direct otherwise.

(b) If the will is contested, or on motion of an interested person made prior to admission of the will to probate, the will shall be established by testimony taken in the manner required for taking testimony in equity cases, or as the court may direct.

**History.** Acts 1949, No. 140, § 58; A.S.A. 1947, § 62-2119.

### **CASE NOTES**

**Cited:** *Baxter v. Peters*, 2009 Ark. App. 807, — S.W.3d — (2009).

### **28-40-119. Conditions on which probate ordered and letters granted.**

(a) On a petition for the probate of a will, if the court finds that the testator is dead, that the instrument offered for probate was executed in all respects according to law when the testator was competent to do so and acting without undue influence, fraud, or restraint, that the will was not revoked, and that the instrument is his or her last will, then the will shall be admitted to probate as the last will of the testator, but the order need not recite such findings.

(b) On the petition for the appointment of an executor or general administrator, the court shall determine whether the deceased died testate or intestate and shall grant letters accordingly or, on proper grounds, deny the petition.

**History.** Acts 1949, No. 140, § 59; A.S.A. 1947, § 62-2120.



## CASE NOTES

## ANALYSIS

Admission to Probate Granted.  
Disposal of Probate Case.

**Admission to Probate Granted.**

Trial court was not clearly erroneous in holding that will was valid or in finding that testatrix intended to bequeath her property by a will instrument which contained additions and interlineations she dictated to bank officer, and which was executed by the testatrix after those addi-

tions and interlineations were made. *Clark v. National Bank of Commerce*, 304 Ark. 352, 802 S.W.2d 452 (1991).

**Disposal of Probate Case.**

Order which admitted will "conditionally," reservation of issues involved in will contest, and conduct of parties belied assertion that order admitting will to probate disposed of probate case once and for all. *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987).

**28-40-120. Probate of will of nonresident.**

(a) When a will of a nonresident of this state, relative to property within this state, has been admitted to probate in another appropriate jurisdiction, an authenticated copy thereof, accompanied by an authenticated copy of the order admitting the will to probate, may be filed for probate in this state.

(b) When so filed, together with a petition for the admission of the will to probate in this state, the court shall:

(1) Presume, in the absence of evidence to the contrary, that the will was duly executed and proved and admitted to probate in the foreign jurisdiction; and

(2) Admit the will to probate if it appears from the copy and order that the will was executed and proved in the manner prescribed by:

(A) The law of the place of its execution;

(B) The law of the testator's domicile at the time of its execution;

or

(C) The laws of this state.

(c) Unless the will is executed in accordance with § 28-25-103 or § 28-25-104, the petition for its probate shall state the time and place of its execution and the testator's domicile at the time of its execution and at the time of his or her death.

(d)(1) Venue for the proceeding shall be governed by the provisions of § 28-40-102.

(2) Notice of the probation of the will shall be governed by the provisions of § 28-40-111.

**History.** Acts 1949, No. 140, § 60; 1967, No. 287, § 3; A.S.A. 1947, § 62-2121.

## CASE NOTES

## ANALYSIS

Change of Residence.  
Devise of Realty in Arkansas.  
Fraud.  
Right to Contest.  
Time Limit.

**Change of Residence.**

Where testator changed his residence and domicil after making his will, from Arkansas to Oklahoma, and at the time of his death was a resident of Oklahoma, the will could not be probated in the first instance in Arkansas, notwithstanding the assertion of Arkansas residence made in the will. *McCraw v. Simpson*, 203 Ark. 763, 158 S.W.2d 655 (1942) (decision under prior law).

**Devise of Realty in Arkansas.**

A will executed and admitted to probate outside the state of Arkansas is as valid to dispose of real estate situated in this state as if made and admitted to probate here. *Apperson v. Bolton*, 29 Ark. 418 (1874) (decision under prior law).

A will executed outside the state of Arkansas in conformity to the laws of the testator's domicil will not be a valid will of

lands situated in this state unless made in accordance with the requirements of the laws of this state. *Crossett Lumber Co. v. Files*, 104 Ark. 600, 149 S.W. 908 (1912) (decision under prior law).

**Fraud.**

An order of a probate court of another state admitting a will to probate in that state may be attacked on ground it has been obtained by fraud. *Dodd v. Holden*, 205 Ark. 817, 171 S.W.2d 948 (1943) (decision under prior law).

**Right to Contest.**

Former Civil Code § 513(5) did not deprive a party interested in the will of a nonresident of the right to contest its probate on the ground of incapacity or undue influence. *Selle v. Rapp*, 143 Ark. 192, 220 S.W. 662, 13 A.L.R. 494 (1920) (decision under prior law).

**Time Limit.**

Section 28-40-103 which limits the period within which a will may be admitted to probate applies to a nonresident's will which has been admitted to probate in a foreign jurisdiction. *Sims v. Schavey*, 234 Ark. 166, 351 S.W.2d 145, 87 A.L.R.2d 718 (1961).

**28-40-121. Finality of order — Conclusiveness of finding of death.**

An order admitting a will to probate or for the appointment of a personal representative, if not contested or appealed from, shall be final, subject to the following exceptions:

(1) It may be reopened at any time prior to the order of final distribution for the purpose of admitting to probate a will not theretofore presented to the court;

(2) It may be vacated or modified for good cause as provided in § 28-1-115; and

(3)(A) The finding of the fact of death shall be conclusive as to the alleged decedent only if the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his or her last known residence address and when a search is ordered for the alleged decedent as provided in § 28-40-112, the court finds that the search was made.

(B) If notice is sent and search made, and the alleged decedent is not dead, he or she may nevertheless at any time recover the estate from the personal representative if it is in his or her hands, or he or



she may recover the estate or its proceeds from the distributees, if either is in their hands.

**History.** Acts 1949, No. 140, § 61;  
A.S.A. 1947, § 62-2122.

## CASE NOTES

### ANALYSIS

#### In General.

Administrator Protected.

Holographic Wills.

Limitations or Laches.

Unprobated Wills.

#### In General.

A will determines the rights of the parties under it proprio vigore from the death of the testator. Its probate is necessary to fix the right of the executor to execute it, to point out the person authorized to act, and as a basis and prerequisite to letters testamentary, but is not essential to its validity. Rights under it are not lost by failure to probate, and to establish and protect them, the validity of a will may be shown in any court. *Arrington v. McLemore*, 33 Ark. 759 (1878) (decision under prior law).

#### Administrator Protected.

Where, relying upon the statutory presumption of the death of the owner of money, an administrator of his next of kin in good faith received it from a bailee, charged himself with it in his account as

administrator, and expended part of it in discharging the debt of the estate before he learned that the owner was alive, the administrator will be protected to the extent of the amount so expended. *Beam v. Copeland*, 54 Ark. 70, 14 S.W. 1094 (1890) (decision under prior law).

#### Holographic Wills.

The probation of a holographic will cannot give it effect beyond that given to it by statute. *Parker v. Hill*, 85 Ark. 363, 108 S.W. 208 (1908) (decision under prior law).

#### Limitations or Laches.

A suit by an heir, presumed dead from absence, to recover money distributed by an administrator may be barred by limitations or laches. *Hill v. Wade*, 155 Ark. 490, 244 S.W. 743 (1922) (decision under prior law).

#### Unprobated Wills.

An unprobated will cannot be received in evidence as a muniment of title. *Dodd v. Holden*, 205 Ark. 817, 171 S.W.2d 948 (1943) (decision under prior law).

**Cited:** *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

## 28-40-122. Certificate of probate.

(a) When proved as provided in this subchapter, every will, if in the custody of the court, shall have endorsed thereon or annexed thereto a certificate by the clerk that the will has been probated.

(b) If for any reason a will is not in the custody of the court, the court shall find the contents thereof, and the order admitting the will to probate shall state the contents, and a certificate shall be annexed as provided in subsection (a) of this section.

(c) Every will certified as provided in this section, or the record thereof, or a duly certified transcript of the record, may be read in evidence in any court in this state without further proof.

**History.** Acts 1949, No. 140, § 62;  
A.S.A. 1947, § 62-2123.

RESEARCH REFERENCES

**Ark. L. Rev.** Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

CASE NOTES

**Proof of Forgery.**

Where a will appeared on its face to have been executed in accordance with statutory requirements and was properly proved and probated, the burden was on

the contestants claiming that the signatures of the testator and of the attesting witnesses were forgeries. *Hamilton v. Hamilton*, 178 Ark. 241, 10 S.W.2d 377 (1928) (decision under prior law).

**28-40-123. Recording will in other counties.**

The personal representative shall cause a certified copy of the will, with a certificate of probate annexed thereto, to be recorded in the office of the recorder in each county in this state other than the county of probate in which real property of the decedent is situated, the cost thereof to be an expense of the administration.

**History.** Acts 1949, No. 140, § 63; A.S.A. 1947, § 62-2124.

SUBCHAPTER 2 — ARKANSAS ANTE-MORTEM PROBATE ACT OF 1979

SECTION.

28-40-201. Title.

28-40-202. Action for declaratory judgment.

SECTION.

28-40-203. Court findings — Effect.

RESEARCH REFERENCES

**ALR.** Limitation of actions submission of will for probate. 2 A.L.R.4th 1315.

Homicide as precluding taking under will or by intestacy. 25 A.L.R.4th 787.

Impossibility of performance of condition precedent: effect on testamentary gift. 40 A.L.R.4th 193.

Authority of probate court to depart from statutory schedule fixing fees. 40 A.L.R.4th 1189.

Adopted children as subject to protec-

tion of statute regarding right of children pretermitted by will, or statute preventing disinheritance of child. 43 A.L.R.4th 947.

Fraud as extending statutory limitations period for contesting will or its probate. 48 A.L.R.4th 1094.

**U. Ark. Little Rock L.J.** Jans, Survey of Decedents' Estates, 3 U. Ark. Little Rock L.J. 216.

**28-40-201. Title.**

This subchapter shall be known and may be cited as the "Arkansas Ante-Mortem Probate Act of 1979".



**History.** Acts 1979, No. 194, § 1; A.S.A. 1947, § 62-2134.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Leopold and Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 *Ark. L. Rev.* 131.

### 28-40-202. Action for declaratory judgment.

(a) Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the circuit court of the appropriate county of this state for a declaratory judgment establishing the validity of the will.

(b) All beneficiaries named in the will and all the testator's existing intestate successors shall be named parties to the action.

(c) For the purpose of this subchapter, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.

(d) Service of process shall be as in other declaratory judgment actions.

**History.** Acts 1979, No. 194, §§ 2, 3; A.S.A. 1947, §§ 62-2135, 62-2136.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Leopold and Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 *Ark. L. Rev.* 131.

### 28-40-203. Court findings — Effect.

(a) If the court finds that the will was properly executed, that the testator had the requisite testamentary capacity and freedom from undue influence at the time of execution, and that the will is otherwise valid, it shall declare the will valid and order it placed on file with the court.

(b) A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.

**History.** Acts 1979, No. 194, § 4; A.S.A. 1947, § 62-2137.

#### RESEARCH REFERENCES

**Ark. L. Rev.** Leopold and Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 *Ark. L. Rev.* 131.

SUBCHAPTER 3 — PROVING A LOST OR DESTROYED WILL

SECTION.

28-40-301. Circuit court jurisdiction.

28-40-302. Proving will.

SECTION.

28-40-303. Record of decree.

28-40-304. Restraint of administrator.

**Publisher's Notes.** Revised Stat., ch. 157, § 52, provided that the provisions of the act relating to the proof and probate of wills, the jurisdiction of the court of probate and the clerk thereof, and the proceedings thereon should be applicable to wills made previous as well as subsequent to the time when the act took effect.

Revised Stat., ch. 157, § 54, provided that the provisions of the act should not be construed to impair the validity of the execution of any will heretofore made and proven or to affect the construction of any such will.

RESEARCH REFERENCES

**Am. Jur.** 80 Am. Jur. 2d, Wills, § 934 et seq.

**C.J.S.** 95 C.J.S., Wills, § 510 et seq.

**28-40-301. Circuit court jurisdiction.**

Whenever any will shall be lost, or destroyed by accident or design, the circuit court shall have the same power to take proof of the execution of the will and to establish the same, as in cases of lost deeds.

**History.** Rev. Stat., ch. 157, § 48; C. & M. Dig., § 10542; Pope's Dig., § 14560; A.S.A. 1947, § 60-301.

CASE NOTES

ANALYSIS

**In General.**  
Concurrent Jurisdiction.

**In General.**

Chancery courts have jurisdiction to establish lost or destroyed wills. *Dudgeon v. Dudgeon*, 119 Ark. 128, 177 S.W. 402 (1915).

**Concurrent Jurisdiction.**

Lost or destroyed wills are generally established by an action in chancery, but probate court has additional jurisdiction in matters of heirship, adoption, and, concurrent with jurisdiction of other courts, jurisdiction to restore lost wills and for the

construction of wills when incident to the administration of an estate. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

Generally speaking, lost or destroyed wills are established by an action in chancery under this section; however, § 28-1-104(a)(6) grants probate court jurisdiction (concurrent with the jurisdiction other courts) over the restoration of lost wills and for the construction of wills when incident to the administration of an estate. *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994).

**Cited:** *Bradway v. Thompson*, 139 Ark. 542, 214 S.W. 27 (1919); *Lumpkin v. Askins*, 187 Ark. 1009, 63 S.W.2d 984 (1933).



**28-40-302. Proving will.**

No will of any testator shall be allowed to be proved as a lost or destroyed will unless:

(1) The provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness; and

(2) The will is:

(A) Proved to have been in existence at the time of the death of the testator; or

(B) Shown to have been fraudulently destroyed in the lifetime of the testator.

**History.** Rev. Stat., ch. 157, § 51; C. & M. Dig., § 10545; Pope's Dig., § 14563; A.S.A. 1947, § 60-304.

**CASE NOTES****ANALYSIS**

Authority of Court.

Burden of Proof.

Competency of Testimony.

Fraudulent Destruction.

Lost Wills.

Photocopied Copy of Will.

Presumption of Destruction.

Presumption of Revocation.

**Authority of Court.**

In order to establish lost will, probate court must follow dictates of this section. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

**Burden of Proof.**

To establish lost or destroyed wills, it is not sufficient simply to establish the fact that there was a will; it is essential that the proof show its provisions. *Dudgeon v. Dudgeon*, 119 Ark. 128, 177 S.W. 402 (1915).

Where a will offered for probate was regular in form and met all the statutory requirements, including attestation of witnesses, the contestants had the burden to introduce testimony which clearly, positively, and satisfactorily established the contents of a subsequent will, and it was not sufficient to show that the will had been executed containing a revocation clause of former wills; they should have introduced testimony showing the entire contents of the will or all the material parts of it. *Reed v. Johnson*, 200 Ark. 1075, 143 S.W.2d 32 (1940).

The burden is not to overcome the presumption of revocation of a will by clear, satisfactory, and convincing evidence, since only a preponderance of the evidence is required. *Garrett v. Butler*, 229 Ark. 653, 317 S.W.2d 283 (1958).

Proponent of lost will has the burden of proving execution of will and its contents. One seeking to establish lost will must prove its execution and contents by strong, cogent, and convincing evidence, though he is not required to produce evidence sufficient to remove all reasonable doubt. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988).

**Competency of Testimony.**

Where the effect of the testimony of a witness testifying to the execution of a lost will is to make him the sole or principal beneficiary, a will cannot be established by his testimony. *Allnut v. Wood*, 176 Ark. 537, 3 S.W.2d 298 (1928).

**Fraudulent Destruction.**

Loss or destruction, without the testator's consent or knowledge, of a will deposited in a bank for safekeeping during the testator's lifetime amounted to fraudulent destruction of the will within this section. *Rose v. Hunnicutt*, 166 Ark. 134, 265 S.W. 651 (1924).

**Lost Wills.**

A lost will may be proved at a trial although it has never been reinstated as a lost record. *Turley v. Evins*, 109 Ark. 115, 158 S.W. 1080 (1913).

Until it is shown that a will has been duly executed, there can be no establishment of a lost will. *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948).

It was not necessary for the trial judge to determine what became of decedent's will; it was enough that he found that it was not revoked or cancelled by her. *Thomas v. Thomas*, 30 Ark. App. 152, 784 S.W.2d 173 (1990).

Evidence was insufficient to prove a lost will since the decedent's failure to revoke or destroy his will as testified to by the appellant did not constitute evidence that the will was in existence at the time of his death and there was no proof in the record that the will was fraudulently destroyed before the decedent died. *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46, 32 S.W.3d 491 (2000).

"Lost will" was improperly admitted to probate; the fact that the decedent retained a copy of the lost will was improperly considered by the trial court in determining whether the presumption of revocation was rebutted and the executor named in the lost will did not otherwise meet his burden of establishing the lost will. *Remington v. Roberson*, 81 Ark. App. 36, 98 S.W.3d 44 (2003).

Court properly denied a petition by testator's brother to probate an Israeli will as a lost will where the brother failed to prove by strong, cogent, and convincing evidence that the testator executed the Israeli will; further, the testator's widow and a business associate testified that the signature on the Israeli will was not the testator's. *Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006).

#### **Photocopied Copy of Will.**

In a proceeding to admit photocopied copy of a decedent's executed will as final will of the decedent under theory that the original will was lost or accidentally de-

stroyed, the testimony of the drafting attorney that he had caused a copy of the executed will to be made and kept the copy in his possession and the testimony of the attorney and both witnesses to the will as to how, when, and where the will was executed properly proved the will despite the argument that it was possible to transpose a witness' signature by photocopying, since there was no evidence of such transposition. *Tucker v. Stacy*, 272 Ark. 475, 616 S.W.2d 473 (1981).

#### **Presumption of Destruction.**

The presumption that the testator destroyed a will must be overcome before a lost will can be established. *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948).

#### **Presumption of Revocation.**

Where there is no direct or positive testimony showing that a will was in existence at time of a decedent's death or that it was fraudulently destroyed before his death, where it is admitted that the will cannot be found, the law presumes the revocation of the will; however, presumption may be overcome by proof. *Garrett v. Butler*, 229 Ark. 653, 317 S.W.2d 283 (1958).

Where in a will contest although the evidence was sufficient to prove that a will, a copy of which was introduced, was actually executed by the testator, the evidence was insufficient to rebut the presumption that a will in the possession of, or accessible to, the testator was revoked by the testator where the will could not be produced at his death, since there was no evidence offered to suggest that the will had been fraudulently destroyed, misplaced, or destroyed by accident. *Wharton v. Moss*, 267 Ark. 723, 594 S.W.2d 856 (Ct. App. 1979).

**Cited:** *Parker v. Mobley*, 264 Ark. 805, 577 S.W.2d 583 (1979).

### **28-40-303. Record of decree.**

(a) Upon a lost or destroyed will's being established by the decree of a competent court, the decree shall be recorded by the probate clerk of the circuit court before which the will might have been proved if it had not been lost or destroyed.

(b) Letters testamentary or of administration, with the will annexed, shall be issued thereon by the clerk in the same manner as upon a will duly proved before him or her.



**History.** Rev. Stat., ch. 157, § 49; C. & M. Dig., § 10543; Pope's Dig., § 14561; A.S.A. 1947, § 60-302.

### CASE NOTES

**Cited:** Middleton v. Middleton, 188 Ark. 1022, 68 S.W.2d 1003 (1934).

### 28-40-304. Restraint of administrator.

If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, the court to which the application shall be made shall have authority to restrain the administrator so appointed from any act or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

**History.** Rev. Stat., ch. 157, § 50; C. & M. Dig., § 10544; Pope's Dig., § 14562; A.S.A. 1947 § 60-303.

## CHAPTER 41

### DISTRIBUTION WITHOUT ADMINISTRATION

#### SECTION.

28-41-101. Collection of small estates by distributee.

28-41-102. Payment, transfers, or deliveries pursuant to affidavit.

#### SECTION.

28-41-103. Petition and order for no administration.

28-41-104. Proceedings to revoke order.

**Publisher's Notes.** Acts 1983, No. 133, § 2, provided that the provisions of the act shall be applicable to the estates of persons who die subsequent to the effective date of the act.

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety,

shall take effect and be in force from and after its passage and approval."

Acts 1975, No. 620, § 16: July 1, 1975.

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this

act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1983, No. 133, § 4: Feb. 10, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law requires all probate estates with a value in excess of \$15,000 to be distributed by a personal representative appointed by the court; that the \$15,000 maximum is obsolete and should be immediately increased; and that this Act is immediately necessary to accomplish the same. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 2001, No. 1229, § 2: Apr. 2, 2001. Emergency clause provided: "It is hereby found and determined by the Eighty-third General Assembly that Act 992 of 1999 amended Arkansas Code 28-41-101 to provide that if a small estate contains real property the distributee must include in the notice of the decedent's death a statement requiring all persons having claims

against the estate to exhibit them within three (3) months, instead of six (6) months, after the date of the first publication of the notice; that Arkansas Code 28-41-102 also contained the six (6) month provision for filing claims and that it was inadvertently not changed to three (3) months; that this act cures the same by making 28-41-102 consistent with 28-41-101; and that this act should become effective as soon as possible in order to eliminate any confusion regarding whether the statute of limitations involved in those two statutes is six (6) months or three (3) months. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

## RESEARCH REFERENCES

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Probate Code Amendments, 5 Ark. L. Rev. 377.

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### 28-41-101. Collection of small estates by distributee.

(a) The distributee of an estate shall be entitled thereto without the appointment of a personal representative when:

(1) No petition for the appointment of a personal representative is pending or has been granted;

(2) Forty-five (45) days have elapsed since the death of the decedent;

(3) The value, less encumbrances, of all property owned by the decedent at the time of death, excluding the homestead of and the statutory allowances for the benefit of a spouse or minor children, if any, of the decedent, does not exceed one hundred thousand dollars (\$100,000);

(4) There shall be filed with the probate clerk of the circuit court of the county of proper venue for administration an affidavit of one (1) or more of the distributees setting forth:

(A) That there are no unpaid claims or demands against the decedent or his or her estate, that the Department of Human Services



furnished no federal or state benefits to the decedent, or, that if such benefits have been furnished, the department has been reimbursed in accordance with state and federal laws and regulations;

(B) An itemized description and valuation of the personal property and a legal description and valuation of any real property of the decedent, including the homestead;

(C) The names and addresses of persons having possession of the personal property and the names and addresses of any persons possessing or residing on any real property of the decedent; and

(D) The names, addresses, and relationship to the decedent of the persons entitled to and who will receive the property; and

(5) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, a copy of the affidavit certified by the clerk.

(b)(1)(A) The clerk shall file the affidavit, assign it a number, and index it as required by § 28-1-108(1).

(B) He or she shall make a charge of twenty-five dollars (\$25.00) for filing the affidavit and five dollars (\$5.00) for each certified copy.

(C) No order of the court or other proceeding shall be necessary.

(D) No additional fees shall be charged if a will is attached to the affidavit.

(2)(A) If an estate collected under this section contains real property, in order to allow for claims against the estate to be presented the distributee shall cause a notice of the decedent's death and the filing of an affidavit for collecting of his or her estate to be published within thirty (30) days after the affidavit has been filed.

(B) The notice shall contain:

(i) The name of the decedent and his or her last known address;

(ii) The date of death;

(iii) A statement that the affidavit was filed, the date of the filing, and a legal description of all real property listed in the affidavit;

(iv) A statement requiring all persons having claims against the estate to exhibit them, properly verified, within three (3) months from the date of the first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate;

(v) The name and mailing address of the distributee or his or her attorney; and

(vi) The date the notice was first published.

(C) Publication of the notice shall be as provided in §§ 28-1-112(b)(4) and 28-40-111(a)(4).

**History.** Acts 1949, No. 140, § 66; 1951, No. 255, § 5; 1967, No. 287, § 4; 1975, No. 620, § 6; 1979, No. 641, § 1; 1981, No. 714, § 67; 1983, No. 133, § 1; A.S.A. 1947, § 62-2127; Acts 1987, No. 163, § 1; 1989, No. 960, § 1; 1993, No. 415, § 3; 1993, No. 687, § 1; 1999, No. 992, § 1; 2001, No. 1809, § 8; 2003, No. 1185, § 278; 2003, No. 1765, § 38; 2005, No. 899, § 1; 2011, No. 289, § 1; 2011, No. 761, § 1.

**Amendments.** The 2011 amendment

by No. 289 subdivided former (b)(1); and substituted “five dollars (\$5.00)” for “three dollars (\$3.00)” in (b)(1)(B).

The 2011 amendment by No. 761, in (b)(2)(A), substituted “the distributee

shall cause” for “may cause, promptly after the affidavit has been filed” and added “within thirty (30) days after the affidavit has been filed.”

### RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — General Assembly, Probate Law, 24 U. Probate, 10 U. Ark. Little Rock L.J. 599. Ark. Little Rock L. Rev. 631.  
Survey of Legislation, 2001 Arkansas

### CASE NOTES

#### **Applicability.**

Circuit court erred in granting the declaratory judgment in favor of the heirs and ordering the decedent's land to be sold and the proceeds divided accordingly, where the circuit court's ruling was based on an erroneous interpretation and application of § 28-40-104; because the small-estate procedure was excepted from the

requirements of § 28-40-104 and this section, the issue of whether the beneficiary commenced a probate proceeding was irrelevant. *Osborn v. Bryant*, 2009 Ark. 358, 324 S.W.3d 687 (2009).

**Cited:** *Woolsey v. Nationwide Ins. Co.*, 697 F. Supp. 1053 (W.D. Ark. 1988); *Woolsey v. Nationwide Ins. Co.*, 884 F.2d 381 (8th Cir. Ark. 1989).

### **28-41-102. Payment, transfers, or deliveries pursuant to affidavit.**

(a) The person making payment, transfer, or delivery pursuant to the affidavit described in § 28-41-101 shall be released to the same extent as if made to a personal representative of the decedent, and he or she shall not be required to see to the application thereof or to inquire into the truth of any statement in the affidavit.

(b)(1) The distributee to whom payment, transfer, or delivery is made, as trustee, shall be answerable to any person having a prior right and shall be accountable to any personal representative thereafter appointed.

(2) However, if notice to creditors of the decedent's death and the collection of his or her estate is published as provided by § 28-41-101, all claims as to real property within the estate, in any event, shall be forever barred at the end of three (3) months after the date of the first publication of the first notice.

(3) Nothing in this section shall affect or prevent any action or proceeding to enforce any mortgage, pledge, or other lien arising under contract or statute upon the property of the estate.

(c) If the person to whom the affidavit is delivered refuses to pay, transfer, or deliver the property as provided in this section, the property may be recovered or delivery compelled in an action brought in a court of competent jurisdiction for such a purpose by or in behalf of the distributee entitled to the property upon proof of the facts required to be stated in the affidavit.



(d) After filing the affidavit and publishing the notice required by § 28-41-101, the distributee entitled to the transfer or delivery of real property shall:

(1) Be authorized to issue to himself or herself a deed of distribution for the real property of the decedent as if made by a personal representative of the decedent; and

(2) Deliver notice of the transfer of ownership to the county assessor of each county where the real property is located.

**History.** Acts 1949, No. 140, § 67; A.S.A. 1947, § 62-2128; Acts 1993, No. 687, § 2; 2001, No. 1229, § 1; 2011, No. 761, § 2.

**Amendments.** The 2011 amendment subdivided and rewrote (d).

### CASE NOTES

**Cited:** Woolsey v. Nationwide Ins. Co., 697 F. Supp. 1053 (W.D. Ark. 1988).

### 28-41-103. Petition and order for no administration.

(a) Either with or without administration, if the court shall determine upon petition of an interested person that the personal property owned by a decedent at the time of his or her death does not exceed that to which the surviving spouse, if any, or minor children, if any, are by law entitled free of debt, as dower or curtesy and statutory allowances, then the court may enter an order vesting the entire estate in the surviving spouse and minor children, or the surviving spouse or minor children.

(b) The statutory allowances payable to or for the benefit of the minor children of the decedent may be paid to the surviving parent without the interposition of a guardian if the surviving parent has custody of the minor children.

(c) The petition may be granted without notice or upon such notice as the court may direct.

(d)(1) The order shall specifically describe the property vested thereby.

(2) The order, to the extent of the property specifically described in the order, until revoked, shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the decedent and to persons purchasing or otherwise dealing with the property, for payment or transfer to the persons described in the order as entitled to receive the property.

**History.** Acts 1949, No. 140, § 68; A.S.A. 1947, § 62-2129.

**28-41-104. Proceedings to revoke order.**

At any time within one (1) year after the making of an order as provided in § 28-41-103, the court, either for good cause shown upon petition of an interested person or upon its own motion, may set the order aside.

**History.** Acts 1949, No. 140, § 69;  
A.S.A. 1947, § 62-2130.

## CHAPTER 42

### ANCILLARY ADMINISTRATION

## SECTION.

- 28-42-101. General law to apply.
- 28-42-102. Application for ancillary letters.
- 28-42-103. Ancillary personal representative — Bond.
- 28-42-104. Designation of agent.
- 28-42-105. Substitution of foreign for local representative.
- 28-42-106. Removal of assets to domiciliary jurisdiction.
- 28-42-107. Payment of claims generally.

## SECTION.

- 28-42-108. Payment of claims — Insolvent estates.
- 28-42-109. Transfer of residue to domiciliary personal representative.
- 28-42-110. Payment of debt and delivery of property to domiciliary foreign personal representative.
- 28-42-111. Jurisdiction over foreign personal representative.

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#### RESEARCH REFERENCES

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 645 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 916 et seq.

**28-42-101. General law to apply.**

Except when special provision is made otherwise, the law and procedure relating to the administration of estates of resident decedents shall apply to the ancillary administration of estates of nonresident decedents.

**History.** Acts 1949, No. 140, § 187;  
A.S.A. 1947, § 62-3109.

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#### CASE NOTES

**Applicability.**

Under this section, a decedent's holographic will, executed during his resi-

dency in Alberta, Canada, was subject to the laws of Arkansas in the ancillary probate proceedings instituted there. *Craig v.*



Carrigo, 353 Ark. 761, 121 S.W.3d 154 (2003).

Where the Arkansas trial court made no finding regarding the solvency of the decedent's estate, it was improper for the trial court to grant summary judgment on the Tennessee creditors' claims against

the estate. There was no evidence to indicate that the creditors properly presented their claims in the ancillary action pursuant to this section. *Ellingsen v. King*, 2009 Ark. App. 655, — S.W.3d — (2009).

**Cited:** *Norton v. Luttrell*, 99 Ark. App. 109, 257 S.W.3d 580 (2007).

## 28-42-102. Application for ancillary letters.

(a)(1) A foreign personal representative, upon the filing of an authenticated copy of his or her domiciliary letters with the circuit court of the county of proper venue, may be issued letters in this state, notwithstanding that the personal representative is a nonresident of this state.

(2) A corporate foreign personal representative need not otherwise qualify as a corporation to do business under the general corporation laws of this state to authorize it to act as ancillary personal representative in the particular estate if it complies with the provisions of §§ 28-42-104 and 28-42-105.

(b) Upon application by a foreign personal representative for the issuance of ancillary letters, preference shall be given to such an applicant, unless the court finds that the appointment will not be for the best interest of the estate. If the court so finds, the court may order the issuance of ancillary letters to any person eligible under the provisions of § 28-48-101.

(c) An interested person may apply for issuance of ancillary letters to a qualified person other than the foreign personal representative. In that event, the applicant, in the manner directed or approved by the court, shall give notice of the application to the foreign personal representative, if the foreign personal representative's name and address are known, and to the court which appointed him or her, if the court is known. If, at the time of filing the application, the name and address of the foreign representative or the court which appointed him or her are not known, the notice shall be given as soon thereafter, either before or after the issuance of letters, as the facts pertaining thereto become known.

**History.** Acts 1949, No. 140, § 179; A.S.A. 1947, § 62-3101.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notices Under the Probate Code, 8 Ark. L. Rev. 324.

## CASE NOTES

### Appointment Discretionary.

The refusal of a court to appoint a Texas domiciliary administrator as ancillary administrator was not an abuse of discretion

where all of the assets of the estate, with the exception of an apparent small amount of personal property in Texas, were located in Arkansas, and that prop-

erty would likely have to be sold for the payment of debts. *Phillips v. Sherrod Estate*, 248 Ark. 605, 453 S.W.2d 60 (1970).

Evidence that the bulk of decedent's property was located in Perry County, Arkansas, which would probably have to be sold to pay decedent's debts, and that the creditors of decedent lived in Perry

County was sufficient to sustain a finding by the probate court that it was not in the best interest of the estate to appoint a Texas administrator located two hundred miles away in Texarkana as ancillary administrator. *Phillips v. Sherrod Estate*, 248 Ark. 605, 453 S.W.2d 60 (1970).

### **28-42-103. Ancillary personal representative — Bond.**

An ancillary personal representative shall give bond as required by § 28-48-201. However, if he or she is a resident of this state, the bond may be reduced or dispensed with in accordance with § 28-48-206.

**History.** Acts 1949, No. 140, § 180; A.S.A. 1947, § 62-3102.

## **CASE NOTES**

### **Failure to Obtain Bond.**

Estate administrator's amended complaint for the wrongful conversion of timber, brought on behalf of the estate, was time-barred under § 16-56-105(4) and (6), the three-year statute of limitations for trespass and conversion, and § 16-56-108, the two-year statute of limitations applicable to penal statutes where the penalty

goes to the person suing, which included claims brought pursuant to § 18-60-102. It was also barred because the administrator failed to meet the bond requirement of this section. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 480 (June 25, 2009).

### **28-42-104. Designation of agent.**

Prior to the granting of ancillary letters to a nonresident, the nonresident ancillary personal representative shall comply with the provisions of § 28-48-101(b)(6) concerning designation of an agent to accept service of process.

**History.** Acts 1949, No. 140, § 181; A.S.A. 1947, § 62-3103.

## **RESEARCH REFERENCES**

**Ark. L. Rev. Notices Under the Probate Code**, 8 Ark. L. Rev. 324.

### **28-42-105. Substitution of foreign for local representative.**

(a)(1) If any other person has been appointed local personal representative, the foreign personal representative, not later than twenty (20) days after the dispatch of notice to him or her under § 28-42-102, unless this period is extended for cause by the court, may apply for revocation of the appointment and for granting of ancillary letters to himself or herself.



(2) Notice of the hearing on the application shall be given to the local personal representative.

(b)(1) Upon the finding that the action is for the best interest of the estate, the court may revoke the letters of the local personal representative and grant the application of the foreign personal representative.

(2) After the application is granted, the local personal representative shall deliver to the foreign personal representative all assets and records of the estate in his or her possession and shall account to the foreign personal representative and to the court.

(3) The hearing on the account may be held immediately, or upon such notice as the court may direct.

(4) Upon compliance with the court's direction, the local personal representative and his or her sureties shall be discharged.

(c)(1) Upon qualification, the foreign personal representative shall be substituted in all actions and proceedings brought by or against the local personal representative in his or her representative capacity and shall be entitled to all the rights and be subject to all the burden arising out of the uncompleted administration in all respects as if it had been continued by the local personal representative.

(2) If the local personal representative has served or has been served with any process or notice, no further service or notice shall be necessary, nor shall the time within which any steps may or must be taken be changed, unless the court in which the action or proceedings are pending so orders.

**History.** Acts 1949, No. 140, § 182;  
A.S.A. 1947, § 62-3104.

## **28-42-106. Removal of assets to domiciliary jurisdiction.**

(a) **PETITION.** Prior to the final disposition of the ancillary estate under § 28-42-109 and upon giving such notice as the court may direct, the foreign personal representative may apply for leave to remove all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(b) **ORDER.**

(1) Before granting the petition, the court shall inquire into the sufficiency of the bond given pursuant to the provisions of § 28-42-103 and shall direct the furnishing of an additional bond if required for the protection of the estate or interested persons.

(2) The court, in its discretion, may grant, deny, or postpone action on the petition.

(3) The granting of the petition shall not terminate the ancillary administration.

**History.** Acts 1949, No. 140, § 183;  
A.S.A. 1947, § 62-3105.

**28-42-107. Payment of claims generally.**

An ancillary personal representative may pay a claim against the estate only if it has been presented and allowed in the manner and within the time required to establish a claim against an estate of domiciliary administration in this state.

**History.** Acts 1949, No. 140, § 184; A.S.A. 1947, § 62-3106.

**Cross References.** Claims against estates, § 28-50-101 et seq.

**CASE NOTES****Illustrative Cases.**

Where the Arkansas trial court made no finding regarding the solvency of the decedent's estate, it was improper for the trial court to grant summary judgment on the Tennessee creditors' claims against the estate. There was no evidence to indi-

cate that the creditors properly presented their claims in the ancillary action in the manner required by Arkansas law and within the time permitted by this section. *Ellingsen v. King*, 2009 Ark. App. 655, — S.W.3d — (2009).

**28-42-108. Payment of claims — Insolvent estates.****(a) EQUALITY SUBJECT TO PREFERENCES AND SECURITY.**

(1) If the estate, either in this state or as a whole, is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his or her claim, subject to preferences and priorities and to any security which a creditor has as to particular assets.

(2) If a preference or priority is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his or her claim after deducting the amount of the benefit.

(3) The validity and effect of any security held in this state shall be determined by the law of this state, but a secured creditor who has not released or surrendered his or her security shall be entitled only to a proportion computed upon the balance due after the value of all security not exempt from the claims of unsecured creditors is determined and credited upon the claim secured by it.

**(b) PROCEDURE.**

(1) In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with § 28-42-109.

(2) If local assets are not sufficient to pay all claims allowed in this state the full amount to which they are entitled under this section, local assets shall be marshaled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

**History.** Acts 1949, No. 140, § 185; A.S.A. 1947, § 62-3107.



## CASE NOTES

**Solvency.**

Where the Arkansas trial court made no finding regarding the solvency of the decedent's estate, it was improper for the trial court to grant summary judgment on the Tennessee creditors' claims against the estate. In accordance with this sec-

tion, it was necessary to determine whether the estate was solvent before determining whether certain creditors' claims would be allowed. *Ellingsen v. King*, 2009 Ark. App. 655, — S.W.3d — (2009).

**28-42-109. Transfer of residue to domiciliary personal representative.**

(a)(1) Any movable assets remaining in the hands of the ancillary personal representative after the payment of all claims allowed in this state may by the court be ordered transferred to the personal representative in the domiciliary jurisdiction.

(2) This transfer may be conditioned upon satisfactory evidence being furnished to the court that the domiciliary personal representative has given bond sufficient for the protection of the estate and persons interested in the estate with respect to the property so transferred.

(b) Upon good cause shown, the court may order the sale of local assets by the ancillary personal representative for the purpose of transmitting the proceeds to the domiciliary personal representative.

**History.** Acts 1949, No. 140, § 186;  
A.S.A. 1947, § 62-3108.

**28-42-110. Payment of debt and delivery of property to domiciliary foreign personal representative.**

(a) At any time after the expiration of sixty (60) days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or deliver the instrument evidencing the debt, obligation, stock, or chose in action to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of the representative's appointment and an affidavit made by or on behalf of the representative stating:

(1) The date of the death of the nonresident decedent;  
(2) That no local administration, or application or petition therefor, is pending in this state; and

(3) That the domiciliary foreign personal representative is entitled to payment or delivery.

(b) Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

(c) Payment or delivery under subsection (a) of this section may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

**History.** Acts 1981, No. 370, § 1; A.S.A. 1947, § 62-3110.

### RESEARCH REFERENCES

**Ark. L. Rev.** Leflar, Conflict of Laws: Survey, Decedents' Estates, 4 U. Ark. Arkansas, 1978-82, 36 Ark. L. Rev. 191. Little Rock L.J. 591.  
**U. Ark. Little Rock L.J.** Legislative

### 28-42-111. Jurisdiction over foreign personal representative.

(a) A foreign personal representative submits himself or herself to the jurisdiction of the courts of this state by:

(1) Receiving payment of money, or taking delivery of personal property under § 28-42-110; or

(2) Doing any act as a personal representative in this state which would have given the state jurisdiction over him or her as an individual.

(b) Jurisdiction under subdivision (a)(1) of this section shall be limited to the money or value of personal property collected.

**History.** Acts 1981, No. 370, § 2; A.S.A. 1947, § 62-3111.

### RESEARCH REFERENCES

**Ark. L. Rev.** Leflar, Conflict of Laws: Survey, Decedents' Estates, 4 U. Ark. Arkansas, 1978-82, 36 Ark. L. Rev. 191. Little Rock L.J. 591.  
**U. Ark. Little Rock L.J.** Legislative

## CHAPTERS 43-47

[Reserved]

## CHAPTER 48

## PERSONAL REPRESENTATIVES

### SUBCHAPTER.

1. GENERAL PROVISIONS.
2. BOND.
3. PUBLIC ADMINISTRATORS.



## RESEARCH REFERENCES

**ALR.** Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust. 6 A.L.R.4th 786.

Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator. 9 A.L.R.4th 1223.

Adverse interest or position as disquali-

fication for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.

Attorney's delay in handling decedent's estate as ground for disciplinary action. 21 A.L.R.4th 75.

**Ark. L. Rev.** Acts 1949 General Assembly—Act 140 The Probate Code, 3 Ark. L. Rev. 375.

## SUBCHAPTER 1 — GENERAL PROVISIONS

## SECTION.

28-48-101. Persons entitled to domiciliary letters.

28-48-102. Letters — Issuance — Form.

28-48-103. Special administrators.

28-48-104. Joint personal representatives.

28-48-105. Removal generally.

28-48-106. Death or incompetency — Protection of estate.

## SECTION.

28-48-107. Successor personal representatives.

28-48-108. Compensation of personal representative — Employment of attorneys, etc.

28-48-109. Allowances for defending will or prosecuting its probate.

**Effective Dates.** Acts 1957, No. 297, § 4: Mar. 27, 1957. Emergency clause provided: "The General Assembly has ascertained that there are now pending in this State a great number of estates of deceased persons and that many more such cases will arise annually in the various counties of this State, and that an urgent need exists for a legislative establishment of a definite and uniform schedule of legal fees to be changed as expenses of such estates to assist the Probate Judges of the

State and for the guidance of the personal representatives and attorneys, and for the information of the heirs and beneficiaries of estates of decedents, for the accomplishment of which this Act is adopted. An emergency is, therefore, declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

Acts 1975, No. 620, § 16: July 1, 1975.

## RESEARCH REFERENCES

**ALR.** Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 A.L.R.4th 708.

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 42 et seq.

**C.J.S.** 33 C.J.S., Exec. & Ad., § 17 et seq.

**28-48-101. Persons entitled to domiciliary letters.**

(a) Domiciliary letters testamentary or of general administration may be granted to one (1) or more of the natural or corporate persons mentioned in this section who are not disqualified, in the following order of priority:

(1) To the executor or executors nominated in the will;

(2) To the surviving spouse, or his or her nominee, upon petition filed during a period of thirty (30) days after the death of the decedent;

(3) To one (1) or more of the persons entitled to a distributive share of the estate, or his or her nominee, as the court in its discretion may determine, if application for letters is made within forty (40) days after the death of the decedent, in case there is a surviving spouse and, if no surviving spouse, within thirty (30) days after the death of the decedent; and

(4) To any other qualified person.

(b) No person is qualified to serve as domiciliary personal representative who is:

(1) Under twenty-one (21) years of age;

(2) Of unsound mind;

(3) A convicted and unpardoned felon, either under the laws of the United States or of any state or territory of the United States;

(4) A corporation not authorized to act as fiduciary in this state;

(5) A person whom the court finds unsuitable; or

(6)(A) A natural person who is a nonresident of this state, unless he or she shall have appointed the clerk of the court in which the proceedings are pending, and the clerk's successors in office, or some person residing in the county of probate and approved by the court, as agent to accept service of process and notice in all actions and proceedings with respect to the estate.

(B) If a person other than the clerk who has been appointed process agent dies, becomes incompetent, or removes from the county, the clerk and his or her successors in office shall become the process agent.

(C) The appointment or agency may be revoked only upon the appointment of a qualified substitute agent.

(D) Upon the service of any process or notice on the agent, he or she shall immediately transmit the process or notice to the personal representative by registered or certified mail, requesting a return receipt.

**History.** Acts 1949, No. 140, § 70;  
1975, No. 620, § 7; A.S.A. 1947, § 62-  
2201.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Notices Under the Probate  
Code, 8 Ark. L. Rev. 324.



## CASE NOTES

## ANALYSIS

Absence in Military Service.  
Discretion of Court.  
Evidence of Refusal.  
Father as Administrator.  
Grandmother as Administratrix.  
Law Applicable to Administrator.  
Minor Nominating Administrator.  
Preferential Right of Creditor.  
Priority.  
Qualifications of Appointee.  
Votes for Administrator.

**Absence in Military Service.**

A chancery court's refusal to remove testamentary trustee on ground of trustee's absence in the military service, where it appeared he was not neglecting the trust estate, was not an abuse of discretion. *Blumenstiel v. Morris*, 207 Ark. 244, 180 S.W.2d 107 (1944) (decision under prior law).

**Discretion of Court.**

This section does not make it compulsory on a court to make an appointment in the order of priority mentioned, and for sufficient cause and in unusual circumstances, as where the applicant of that class is not qualified or, in the court's opinion, will not best manage and improve the estate, the court may refuse an appointment though the applicant is otherwise qualified. *Burnett v. United States Fid. & Guar. Co.*, 228 Ark. 857, 310 S.W.2d 806 (1958); *Knight v. Worthen Bank & Trust Co.*, 233 Ark. 465, 345 S.W.2d 361 (1961).

Although a court is not bound to appoint from the highest priority nominees if it finds sufficient cause or unusual circumstances, in the absence of unusual circumstances or sufficient cause, it is the duty of the court to follow the statutes such as this section as set out by the General Assembly. *McEntire v. McEntire*, 265 Ark. 260, 577 S.W.2d 607 (1979).

**Evidence of Refusal.**

Where two or more persons are named as executors, the renunciation or refusal of one to join or take upon himself the execution of a will cannot be evidenced by acts in pais, but must be shown by matter of record. *Newton v. Cocke*, 10 Ark. (5

English) 169 (1849) (decision under prior law).

Personal representation discharged and released the estate from her right to seek appointment that she otherwise had pursuant to the probate code and the terms of the will. *Green v. McAuley*, 59 Ark. App. 114, 953 S.W.2d 66 (1997).

**Father as Administrator.**

Father of minor child killed in automobile accident though divorced was qualified to act as administrator of child where mother who had custody was permanently injured in same accident. *Smith v. Rudolph*, 221 Ark. 900, 256 S.W.2d 736 (1953).

**Grandmother as Administratrix.**

Paternal grandmother of decedent was qualified to serve as administratrix even though she was not entitled to a distributive share, because she had been nominated by persons who were. *Wisdom v. McBride*, 311 Ark. 492, 845 S.W.2d 6 (1993).

**Law Applicable to Administrator.**

An administrator cum testamento annexo is liable to the same provisions of the law as other administrators, except that he distributes the estate according to the will. *Whitlow v. Patterson*, 195 Ark. 173, 112 S.W.2d 35 (1937) (decision under prior law).

**Minor Nominating Administrator.**

A nineteen-year-old widow, although disqualified to serve as administrator of her deceased husband's estate, was not precluded from the right to nominate an administrator. *Brod v. Brod*, 227 Ark. 723, 301 S.W.2d 448, 64 A.L.R.2d 1147 (1957).

**Preferential Right of Creditor.**

Where a widow failed or refused to administer the estate of her deceased husband, a creditor had a preferential right to move for the appointment of an administrator. *Lineback v. Howerton*, 181 Ark. 433, 26 S.W.2d 74 (1930) (decision under prior law).

**Priority.**

Decedent's father and the decedent's uncle, who was the nominee of his mother, shared equal priority as nominees under

(a)(3). In re Estate of Robinson, 36 Ark. App. 1, 816 S.W.2d 896 (1991).

**Qualifications of Appointee.**

Persons named as a preferred class are subject to the conditions that an administrator must be qualified and must, in the opinion of the court, be the person who can best manage and improve an estate. Woodruff v. Miller, 209 Ark. 759, 192 S.W.2d 527 (1946) (decision under prior law).

**Votes for Administrator.**

Trial court should not weigh votes of distributees for administrator of an estate

in the order of descent, as prescribed in § 28-9-214, but even if it did so, if the trial court were to find a tie-vote for administrator of an estate at the first level of priority, it would be logical to proceed to the next level to break the tie. Wisdom v. McBride, 311 Ark. 492, 845 S.W.2d 6 (1993).

**Cited:** Sides v. Haynes, 181 F. Supp. 889 (W.D. Ark. 1960); Roberson v. Hamilton, 240 Ark. 898, 405 S.W.2d 253 (1966); Standridge v. Standridge, 304 Ark. 364, 803 S.W.2d 496 (1991); In re Vesa, 319 Ark. 574, 892 S.W.2d 491 (1995).

**28-48-102. Letters — Issuance — Form.**

- (a) When a duly appointed personal representative has given such bond as may be required and the bond has been approved by the court or by the clerk, subject to confirmation by the court, or, if no bond is required, when the personal representative has filed with the clerk a written acceptance of his or her appointment, letters under the seal of the court shall be issued to him or her.
- (b) The letters shall be in substantially the following form:

In the Probate Court of ..... County, Arkansas.  
In the Matter of the Estate of C.D., deceased.  
No. ....

**Letters of Administration (Testamentary)**

Be it known that A.B., whose address is ....., having been duly appointed administrator of the estate (executor of the will) of C.D., deceased, who died on or about ....., 20...., and having qualified as such administrator (executor) is hereby authorized to act as such administrator (executor) for and in behalf of the estate and to take possession of the property thereof as authorized by law.

Issued this ....day of ....., 20....

Clerk.

(Seal)

(c) Letters of administration with will annexed, administration in succession, and special administration shall conform with this form with appropriate modifications.

(d)(1)(A) Letters of administration are not necessary to empower the person appointed to act for the estate.

(B) Letters of administration are for the purpose of notifying third parties that the appointment of an administrator has been made.

(2) The order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid.



**History.** Acts 1949, No. 140, § 71; A.S.A. 1947, § 62-2202; Acts 2007, No. 438, § 1.

**Amendments.** The 2007 amendment added (d).

## RESEARCH REFERENCES

**Ark. L. Rev.** Recent Development: Arkansas Act 438 of 2007, 60 Ark. L. Rev. 1023.

## CASE NOTES

### ANALYSIS

Construction.  
Necessity for Letters.  
Power to Bring Suit.  
Release of Note.

### Construction.

Trial court erred in awarding summary judgment to defendants in a wrongful death and survival action brought by a patient's relatives where Acts 2007, chapter 438, amending this section, provided that letters of administration were not necessary to empower a person appointed to act for an estate. Chapter 438 was procedural and was meant to be applied retroactively. *Steward v. Statler*, 371 Ark. 351, 266 S.W.3d 710 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 662 (Dec. 6, 2007).

Trial court erred in awarding summary judgment to a doctor in personal representative's medical malpractice and wrongful death action because under this section, it was an order of appointment, not letters of administration, that empowered the personal representative to act on behalf of the patient's estate. *Estate of Banks v. Wilkin*, 101 Ark. App. 156, 272 S.W.3d 137 (2008).

The 2007 amendment of this section is to be applied retroactively. *Estate of Banks v. Wilkin*, 101 Ark. App. 156, 272 S.W.3d 137 (2008).

### Necessity for Letters.

The probate of a will authorizes the grant of letters testamentary, but, until letters are ordered issued, it gives no authority over the estate. *Jackson v.*

*Reeve*, 44 Ark. 496 (1884) (decision under prior law).

Administratrix was not required to have executed letters of administration in order to file a complaint against the medical center on June 10, 2003, because the order appointing her administratrix was entered before the complaint was filed, was effective at the time the complaint was filed, and empowered her to act for the estate without the necessity of letters of administration. *Brown v. Nat'l Health Care of Pocahontas, Inc.*, 102 Ark. App. 148, 283 S.W.3d 224 (2008).

### Power to Bring Suit.

Son, a foreign administrator of his mother's estate, was subject to the requirements for domiciliary personal representatives pursuant to § 16-61-110, and therefore was required to have been appointed under this section. Because the son had not been appointed administrator of his mother's estate in any state at the time he filed his original complaint for trespass and conversion of timber, he did not have standing to sue; because the complaint was a nullity, a second complaint could not relate back under Ark. R. Civ. P. 15(c). *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 480 (June 25, 2009).

### Release of Note.

A release by one of two joint administrators of a note payable to them in their representative capacity was ineffectual to bar recovery thereon. *Clark v. Gramling*, 54 Ark. 525, 16 S.W. 475 (1891) (decision under prior law).

**28-48-103. Special administrators.**

(a) For good cause shown, a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or a general administrator, with or without the removal of the executor or general administrator.

(b) A special administrator may be appointed without notice or upon such notice as the court may direct.

(c) The appointment may be for a specified time, to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment.

(d) The special administrator shall make such reports as the court shall direct and shall account to the court upon the termination of his or her authority.

(e) Otherwise, and except when the provisions of the Probate Code by their terms apply only to general personal representatives, and except as ordered by the court, the law and procedure relating to personal representatives shall apply to special administrators.

(f) The order appointing a special administrator shall not be appealable.

**History.** Acts 1949, No. 140, § 79; A.S.A. 1947, § 62-2210.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

**CASE NOTES****ANALYSIS**

Appeal.

Appointment for Appeal.

Insurance Claims.

Jurisdiction to Appoint.

Nonresident Appointees.

Receipt of Service.

Standing.

**Appeal.**

No appeal is allowed from an order refusing to appoint a special administrator. *In re Estate of McLaughlin*, 306 Ark. 515, 815 S.W.2d 937 (1991).

Under § 28-1-116, any order of a probate court is generally appealable, but under subsection (f) of this section, there can be no appeal from an order appointing or refusing to appoint a special administrator; however, the denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

There can be no appeal from an order refusing to appoint a special administra-

tor. *Harwood v. Monroe*, 65 Ark. App. 57, 984 S.W.2d 93 (1999).

**Appointment for Appeal.**

A trial court was authorized to appoint a special administrator to appeal a decision setting aside the will of a deceased where the executor, due to relationship to parties concerned, did not want to take an appeal. *Thiel v. Mobley*, 223 Ark. 167, 265 S.W.2d 507 (1954).

**Insurance Claims.**

A special administrator cannot be appointed solely to assert such rights as a claimant might have had against a decedent's insurance carrier. *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970).

There is no authority for the appointment of a special administrator solely for the purpose of receiving proceeds in an action for damages alleged to have resulted from the negligence of a decedent where the prospective plaintiff alleged that the insurance carrier of the decedent fraudulently induced him to delay prosecution of his claim until the time for filing a claim against the estate had ex-



pired by falsely representing that it would settle the claim as soon as plaintiff's injuries could be evaluated. *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970).

There was no question that the probate court had jurisdiction to appoint a special administrator in order to perform the particular acts of litigating wrongful death and life insurance actions. *Douglas v. Holbert*, 335 Ark. 305, 983 S.W.2d 392 (1998), US Supreme Court cert. denied, *Bates v. Arkansas*, 526 U.S. 1064, 119 S. Ct. 1454, 143 L. Ed. 2d 541 (1999).

### **Jurisdiction to Appoint.**

Where the heirs at law attacked probate of a will and filed petitions asking for the removal of the executor on the ground that he failed to include certain assets in the inventory and while matters were pending, the probate court granted a petition for appointment of a special administrator for purpose of filing proceedings against executors and others, the appointment of the special administrator was proper since the probate court had original and exclusive jurisdiction to appoint a special administrator. *Breshears v. Williams*, 223 Ark. 368, 265 S.W.2d 956 (1954).

### **Nonresident Appointees.**

This section authorizes a court to appoint a nonresident as a special administrator. *Evans v. Cano Del Castillo*, 220 Ark. 350, 247 S.W.2d 947 (1952).

The appointment of Mexican counsel for purpose of filing a wrongful death action on behalf of a deceased was an appointment of a special administrator. *Evans v. Cano Del Castillo*, 220 Ark. 350, 247 S.W.2d 947 (1952).

An order appointing a nonresident as a special administrator is not appealable. *Evans v. Cano Del Castillo*, 220 Ark. 350, 247 S.W.2d 947 (1952).

### **Receipt of Service.**

The appointment of a special administrator for the purpose of service in order to

fix venue in damage suit based on the negligence of deceased was erroneous, but was valid until order of appointment was vacated, since order was voidable. *Nickles v. Wood*, 221 Ark. 630, 255 S.W.2d 433 (1953).

Service in a damage suit on a special administrator appointed for that purpose was valid though the special administrator was thereafter removed and a general administrator appointed. *Nickles v. Wood*, 221 Ark. 630, 255 S.W.2d 433 (1953).

### **Standing.**

Order appointing the administratrix on April 11, 2003, as special administratrix specifically stated that the term was for six months; thus, her term expired on October 11, 2003, before she filed complaints against all of the appellees except for the medical center; unless a person was the personal representative or executor of the estate at the time of filing, he had no standing to file a complaint on behalf of the estate and any complaint filed was a nullity, and because the administratrix's complaint was a nullity, her nonsuit on December 6, 2004, did not dismiss these complaints; it dismissed only the properly filed complaint against the medical center, and because the first complaints filed were nullities, the November 17, 2005 complaint was the first complaint filed by a properly appointed personal representative and no savings statute applied; thus, the administratrix's complaint against the medical personnel was barred by the statute of limitations. *Brown v. Nat'l Health Care of Pocahontas, Inc.*, 102 Ark. App. 148, 283 S.W.3d 224 (2008).

**Cited:** *Constitution State Ins. Co. v. Passmore*, 18 Ark. App. 247, 713 S.W.2d 255 (1986); *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998); *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004).

## **28-48-104. Joint personal representatives.**

(a) Unless otherwise provided by will, the powers given to two (2) personal representatives may be exercised only by their joint action, and powers given to more than two (2) personal representatives may be exercised only by the joint action of a majority of them.

(b) Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when

one (1) appointment is terminated by order of the court unless the power is given in the will and its terms otherwise clearly provide as to the exercise of the power.

**History.** Acts 1949, No. 140, §§ 75, 76; A.S.A. 1947, §§ 62-2206, 62-2207.

### CASE NOTES

#### **Construction.**

The plain language of this section clearly mandates that in situations where there are more than two executors of a decedent's estate the powers given to

them may be exercised only by the joint action of the majority of them, unless otherwise provided by the will. *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997).

### **28-48-105. Removal generally.**

(a)(1) When the personal representative becomes mentally incompetent, disqualified, unsuitable, or incapable of discharging his or her trust, has mismanaged the estate, has failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by § 28-48-101(b)(6), then the court may remove him or her.

(2) The court on its own motion may, or on the petition of an interested person shall, order the personal representative to appear and show cause why he or she should not be removed.

(b) The removal of a personal representative after letters have been duly issued to him or her does not invalidate his or her official acts performed prior to removal.

**History.** Acts 1949, No. 140, § 72; A.S.A. 1947, § 62-2203.

### CASE NOTES

#### ANALYSIS

Appeal.

Burden of Proof.

Effect of Removal.

—Retention of Attorneys.

—Service of Process.

Failure to File Account.

Grounds for Removal.

—Failure Generally.

—Improper Accounting.

—Not Shown.

—Removal Not Required.

—Unable to Perform.

Instructions to Jury.

Interested Persons.

Jurisdiction.

Removal Order.

#### **Appeal.**

The denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

#### **Burden of Proof.**

Where no evidence or testimony was produced at the hearing to provide any basis for removing the administrator, record before the Supreme Court, consisting solely of the pleadings, did not prove that the probate court committed error as a matter of law in retaining the administrator and holding that alleged conflicts or mismanagement would be cured by appointing a special administrator to pursue



appeal of judgment against the estate. *Newton County v. West*, 288 Ark. 432, 705 S.W.2d 887 (1986).

Where motion was made to have person removed as administrator of estate and probate court responded by appointing a special administrator to appeal court decision adverse to the estate but retained such person as administrator for all other purposes, the burden was on movant to present a record on appeal demonstrating that the probate court's decision was clearly erroneous, and in the absence of that showing, the Supreme Court would not reverse. *Newton County v. West*, 288 Ark. 432, 705 S.W.2d 887 (1986).

### **Effect of Removal.**

#### **—Retention of Attorneys.**

Where the personal representative of the estate of a person killed in a traffic collision contracted with attorneys to file a wrongful death action, the contract did not confer a vested right on the attorneys to carry the death action to a conclusion, and a successor representative could engage other attorneys. *Gentry v. Richardson*, 228 Ark. 677, 309 S.W.2d 721 (1958).

Beneficiaries may prefer to have independent counsel to protect their interests in a wrongful death suit, but as long as the code provides that the personal representative is the party to bring the action, that party has the absolute right to choose counsel for that purpose. Should the personal representative or chosen council fail to provide adequate representation, application can be made to the probate court to either not approve or disallow the contracts entered into by the representative, and a representative can be removed pursuant to this section if the court finds him unsuitable. *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

#### **—Service of Process.**

Service of process in a suit on a special administrator appointed for that purpose is valid though the special administrator is thereafter removed and a general administrator appointed. *Nickles v. Wood*, 221 Ark. 630, 255 S.W.2d 433 (1953).

#### **Failure to File Account.**

It was no excuse for disobedience of a citation issued pursuant to a statute that an administrator had filed an account several years before which the court had

not acted upon. *Ex parte Pearce*, 44 Ark. 509 (1884) (decision under prior law).

### **Grounds for Removal.**

Circuit court did not abuse its discretion in not removing a coexecutor as one of the coexecutors of a decedent's estate, under this section, because (1) although the circuit court found that the coexecutor had made some errors as one of the coexecutors, it also found that the coexecutor was not intentionally attempting to harm the widow; (2) the circuit court did not find that any of the coexecutor's actions endangered the estate property or that they were intended to harm any party; and (3) the circuit court weighed the coexecutor's actions, both positive and negative, and found that, on balance, the positive benefits to the estate outweighed the negative. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

Trial court did not clearly err in granting a mother's petition to replace a father as guardian of their 21-year-old son, who had Williams syndrome, because the son needed a guardian who was vigilant in ensuring that his needs were met; there were several occasions where the father delayed or denied the son medical attention. *Hoffarth v. Harp*, 2009 Ark. App. 240, 303 S.W.3d 96 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 684 (May 6, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 575 (Sept. 10, 2009).

#### **—Failure Generally.**

Where an administrator failed to give bond, failed to receive letters of administration, and generally failed to carry out her duties as an administrator and her health did not permit her to perform these duties, she should have been removed by the court as she was unsuitable and incapable of discharging her trust and had failed to perform the duties imposed by law. *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959).

#### **—Improper Accounting.**

Where an administrator failed to file a satisfactory account, although admonished to do so some thirteen years earlier, and where she had persistently acted in furtherance of her own interests in a manner to deprive her stepchildren of benefits,

she should be removed. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

—**Not Shown.**

Although the personal representative may not have done everything he should have done to keep the estate's assets properly maintained, and had made partial distribution without court approval as required by statute, since the right people had received the money and could reimburse it if necessary, insufficient grounds for removal pursuant to subdivision (a)(1) of this section were shown. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993).

—**Removal Not Required.**

There was no error in the probate judge's refusal to find any breach of fiduciary duty that would require removal of the executrix. *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991).

—**Unable to Perform.**

Where the evidence showed that two sisters' joint guardianship of a third sister's estate was marked by continual quarreling and bickering, the best interests of ward demanded termination of the guardianship, since the guardians in such circumstances were incapable of satisfactorily performing the duties imposed upon them by law and the courts. *Omohundro v. Erhart*, 228 Ark. 910, 311 S.W.2d 309 (1958).

**Instructions to Jury.**

In a will contest in which a trust was involved, instructions which told the jury that the testator could appoint whom she pleased for executor of her will and also that probate court had right to remove

executor and appoint another in proper case were not erroneous. *Bocquin v. Theurer*, 133 Ark. 448, 202 S.W. 845 (1918), superseded by statute as stated in, *Priola v. Priola*, 237 Ark. 798, 377 S.W.2d 29 (Ark. 1964) (decision under prior law).

**Interested Persons.**

Where the decedent died testate and left them nothing under the will, the decedent's surviving children were not heirs and were not creditors, and were thus not "interested persons" as that term is used in §§ 28-1-102(a)(11), 28-48-107(a), and subdivision (a)(2) of this section. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

**Jurisdiction.**

By the service of a citation, a probate court obtained jurisdiction of the person of an administrator, and any action thereafter revoking his letters, restating his accounts, rejecting former settlements, or ordering distribution of money on hand was within the jurisdiction of the court and not void. *Ex parte Pearce*, 44 Ark. 509 (1884) (decision under prior law).

**Removal Order.**

This section authorizes the removal of a personal representative on the court's own motion, provided the removal order complies otherwise with this section's requirements. In *re Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995).

**Cited:** *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985); *Jones v. Jones*, 301 Ark. 367, 784 S.W.2d 161 (1990); *White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996); *Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997); *Holmes v. McClendon*, 349 Ark. 162, 76 S.W.3d 836 (2002).

**28-48-106. Death or incompetency — Protection of estate.**

(a) The death of a personal representative or the appointment of a guardian for the estate of a personal representative terminates his or her appointment.

(b) Until appointment and qualification of a successor or special representative to replace the deceased or incompetent representative, the representative of the estate of the deceased or incompetent personal representative, if any, has the duty to protect the estate possessed and being administered by his or her decedent or ward at the time his or her appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver the estate assets to a



successor or special personal representative upon his or her appointment and qualification.

**History.** Acts 1975, No. 620, § 14;  
A.S.A. 1947, § 62-2203.1.

### **28-48-107. Successor personal representatives.**

(a) When a personal representative dies, is removed by the court, or resigns and the resignation is accepted by the court, the court may, and, if he or she was the sole or last surviving personal representative and the administration is not completed, the court shall, appoint another personal representative in his or her place upon the motion or petition of an interested person.

(b) When a personal representative in succession or an administrator with the will annexed is appointed, he or she shall have all the rights and powers of his or her predecessor or of the executor nominated in the will, except that he or she shall not exercise powers given in the will which by its terms are clearly personal to the executor therein nominated.

**History.** Acts 1949, No. 140, §§ 73, 74;  
A.S.A. 1947, §§ 62-2204, 62-2205.

## **CASE NOTES**

### **ANALYSIS**

Appointment After Final Settlement.  
Appointment Generally.  
Discretion of Court.  
Estoppel to Sue.  
Insolvency of Representative.  
Interested Persons.  
Necessity for Appointment.  
Powers Generally.  
Prerequisites to Action on Bond.  
Presentation of Claims.

#### **Appointment After Final Settlement.**

An order of a probate court appointing an administrator in succession after the former administrator's final settlement had been approved was without jurisdiction and void. *Beckett v. Whittington*, 92 Ark. 230, 122 S.W. 633 (1909) (decision under prior law).

#### **Appointment Generally.**

Personal representative discharged and released the estate from her right to seek appointment that she otherwise had pursuant to the Probate Code and the terms of the will. *Green v. McAuley*, 59 Ark. App. 114, 953 S.W.2d 66 (1997).

### **Discretion of Court.**

It is within a court's discretion to refuse to permit an interested party to serve as an administrator in succession of an estate where an accounting proceeding has been instituted, since such a party would thereby be assuming the dual role of assailant and defender of the accounting proceeding. *Burnett v. United States Fid. & Guar. Co.*, 228 Ark. 857, 310 S.W.2d 806 (1958).

Where allowing the administrator to resign did not affect the venue fixed in the actions already filed against the estate and remedies were available for the appointment of a successor administrator, the probate judge did not abuse his discretion in permitting the administrator to resign. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

### **Estoppel to Sue.**

Where appellant, as administrator in succession, received without objection from her predecessor certain notes secured by mortgage belonging to the estate, sued and foreclosed the mortgage, both she and her wards, heirs of the deceased, were estopped thereafter to sue her pre-

decessor for the money which the notes represented. *Meyer v. Fidelity & Deposit Co.*, 197 Ark. 418, 122 S.W.2d 586 (1938) (decision under prior law).

### **Insolvency of Representative.**

Upon the insolvency of a bank designated by a testator as his executor and trustee, the chancery court, independently of any provision in a will, properly appointed a trustee in succession. *Bieatt v. Echols*, 181 Ark. 235, 25 S.W.2d 431 (1930) (decision under prior law).

### **Interested Persons.**

Where a suit had been filed against an estate at a time when the estate had an administrator and the administrator petitioned the court to resign, the parties filing the suit were interested parties and aggrieved parties for the purposes of appealing from probate court orders allowing the administrator to resign. *Barkley v. Cullum*, 252 Ark. 474, 479 S.W.2d 535 (1972).

Where the decedent died testate and left them nothing under the will, the decedent's surviving children were not heirs and were not creditors, and were thus not "interested persons" as that term is used in §§ 28-1-102(a)(11), 28-48-105(a)(2), and subsection (a) of this section. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

### **Necessity for Appointment.**

The necessity for appointment of an administrator de bonis non having been

adjudged by probate court was held to be conclusive in a collateral issue. *Stewart v. Smiley*, 46 Ark. 373 (1885) (decision under prior law).

### **Powers Generally.**

The extent of the power of an administrator de bonis non was held to collect and administer such property and effects of the deceased as were unadministered by the former representative, as remained in specie, and were capable of being ascertained and identified as the specific property of the estate represented by him. *Finn v. Hempstead*, 24 Ark. (11 Barber) 111 (1863) (decision under prior law).

### **Prerequisites to Action on Bond.**

An administrator in succession must proceed in the probate court against the former executor or administrator for a settlement or an accounting and an order to pay over the sum found due him before he can sue the bondsmen of the former executor or administrator. *Statham v. Brooke*, 140 Ark. 187, 215 S.W. 581 (1919) (decision under prior law).

### **Presentation of Claims.**

It is not necessary to the validity of the judgment of the circuit court against a deceased administrator's estate relative to his account that it should be presented to his executors. *McLain v. Sprigg*, 174 Ark. 1052, 298 S.W. 870 (1927) (decision under prior law).

## **28-48-108. Compensation of personal representative — Employment of attorneys, etc.**

(a) The personal representative shall be allowed such compensation for his or her services, when and as earned, as the court shall deem just and reasonable. Except as provided in subsection (b) of this section, this compensation is not to exceed ten percent (10%) of the first one thousand dollars (\$1,000), five percent (5%) of the next four thousand dollars (\$4,000), and three percent (3%) of the balance of the value of the personal property passing through the hands of the personal representative, provided that compensation shall be allowed only on the value of such property as shall have been fully administered.

(b)(1) When the personal representative has performed substantial duties with respect to or on account of real property of the decedent, the court, in addition to other compensation provided by the Probate Code, may allow a reasonable compensation for such services with the amount thereof to be fixed by the court, taking into consideration the



nature and extent of the services, the extent and value of the real property, and other relevant circumstances.

(2) The burden of the payment of the additional compensation shall be borne in accordance with applicable provisions of the will, if any. Otherwise, the burden of the payment shall be borne by the distributees or beneficiaries of the estate whom the court finds to have been benefited by the services, in accordance with the principles of equity.

(c) The court, in the exercise of its discretion, may decline to allow any compensation to or on behalf of a personal representative who has failed, after being cited to do so, to file a satisfactory account or to perform any other substantial duty pertaining to his or her office, and, for the same reason, the court may reduce the compensation which would otherwise be allowed to or on behalf of such a personal representative.

(d)(1) The personal representative may employ legal counsel in connection with the probate of the will or the administration of the estate, and the attorney so employed shall prepare and present to the circuit court all necessary notices, petitions, orders, appraisals, bills of sale, deeds, leases, contracts, agreements, inventories, financial accounts, reports, and all other proper and necessary legal instruments during the entire six (6) months, or longer when necessary, while the estate is required by law to remain open.

(2) For the legal services described in subdivision (d)(1) of this section, the attorney, unless otherwise contracted with the personal representative, heirs, and beneficiaries of the estate, shall be allowed a fee based on the total market value of the real and personal property reportable in the circuit court, as follows:

(A) Five percent (5%) of the first five thousand dollars (\$5,000);

(B) Four percent (4%) of the next twenty thousand dollars (\$20,000);

(C) Three percent (3%) of the next seventy-five thousand dollars (\$75,000);

(D) Two and three-fourths percent ( $2\frac{3}{4}\%$ ) of the next three hundred thousand dollars (\$300,000);

(E) Two and one-half percent ( $2\frac{1}{2}\%$ ) of the next six hundred thousand dollars (\$600,000); and

(F) Two percent (2%) of the value of all properties thereafter.

(3) If the schedule of fees as provided in subdivision (d)(2) of this section is determined by the court to be either excessive or insufficient under the circumstances, then the court shall allow the attorney a fee commensurate with the value of the legal services rendered.

(e) When authorized by the will or the court, the personal representative may employ accountants, engineers, appraisers, and other persons whose services are reasonably required in connection with the administration of the estate, and the court shall fix or approve the compensation for such services, which shall be allowed as an item of expense of the administration.

(f)(1) Upon election, a personal representative may fix his or her or its own fee and the fees of the attorneys for the estate or any

accountant, auditor, or investment advisor without prior approval from the court, but the reasonableness of the compensation of any person so employed or the compensation for the services of the personal representative, either on petition of any interested person, on petition by the personal representative, or on the court's own motion, shall be reviewed by the court.

(2) Any person who has received excessive compensation from the estate for services rendered may be ordered to make appropriate refunds.

**History.** Acts 1949, No. 140, § 77; 1957, No. 297, § 2; 1967, No. 287, § 5; 1975, No. 620, § 9; A.S.A. 1947, § 62-2208.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

## RESEARCH REFERENCES

**Ark. L. Rev.** Analyzing the Estate, 21 Ark. L. Rev. 1.

## CASE NOTES

### ANALYSIS

In General.  
 Attorney's Fees.  
 —Appeals.  
 —Authorization of Employment.  
 —Category.  
 —Contracts Not Binding.  
 —Discretion of Court.  
 —Evidence.  
 —Liability of Representative.  
 —Not Allowed.  
 —Recourse to Equity.  
 Expenses.  
 —Funeral.  
 —Insurance Premiums.  
 —Personal Expenditures.  
 —Preservation of Estate.  
 —Statement Required.  
 —Traveling.  
 Personal Representatives' Fees.  
 —Allowance on Appeal.  
 —Contracts.  
 —Credit for Uncollectible Items.  
 —Determination.  
 —Discounting Claims.  
 —Discretion of Court.  
 —Foreclosure of Mortgage.  
 —Incorporation by Reference.  
 —Limitation in Wills.  
 —Not Allowed.  
 —Widow.

### In General.

This section provides formulas to compensate personal representatives and attorneys, but does not limit the type of allowable administrative claims. *Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 35 S.W.3d 315 (2000).

### Attorney's Fees.

The fact that an administrator was authorized by a probate court to institute a suit to recover in proper forum an amount due the estate and employ attorneys, did not give the court in which the suit was instituted jurisdiction to distribute the attorney's fees; rather, the entire fund recovered became the property of the estate to be administered by the probate court. *Gillelyen v. Hallman*, 141 Ark. 52, 216 S.W. 15 (1919) (decision under prior law).

Where the value of the personalty plus real property was \$1,484,200, the attorney's fee of \$22,500 was not excessive. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 304, 719 S.W.2d 273 (1986).

Amount of attorneys' fees awarded held proper. *Adams v. West*, 293 Ark. 192, 736 S.W.2d 4 (1987).

This section authorizes the probate court to increase or decrease legal fees in accordance with the value of legal services rendered. *Nabers v. Estate of Setser*, 310 Ark. 194, 833 S.W.2d 375 (1992).



Award of attorney fees to siblings' brother for legal work on their mother's estate was appropriate because the trial court's order recited the factors taken into consideration in making the award, which was approximately one-third less than the amount authorized by this section. *Rollins v. Rollins*, 94 Ark. App. 65, 224 S.W.3d 554 (2006).

#### —Appeals.

Where those appealing from an order of the probate court allowing attorney's fees failed to bring up the testimony heard in the probate court, the Supreme Court presumed the court's action to have been correct. *Brown v. Brown*, 222 Ark. 832, 262 S.W.2d 896 (1953).

#### —Authorization of Employment.

In an order to entitle an attorney to retain a commission out of moneys of an estate collected under the employment of the administrator, it was necessary to show that the probate court authorized the employment. *Turner v. Tapscott*, 30 Ark. 312 (1874), overruled, *Pike v. Thomas*, 62 Ark. 223, 35 S.W. 212 (1896) (decision under prior law).

This section specifically authorizes the personal representative to employ legal counsel and contemplates that counsel's fee will be paid by the estate, not the personal representative. *Alexander v. First Nat'l Bank*, 278 Ark. 406, 646 S.W.2d 684 (1983).

Probate courts can authorize the administrator to employ counsel in the necessary protection of the estate in his hands and may allow fees for such services rendered the administrator to protect and preserve the estate; however, the court has no jurisdiction to award fees for services rendered to an individual beneficiary. *Croft v. Clark*, 24 Ark. App. 16, 748 S.W.2d 149 (1988).

#### —Category.

An attorney's fee was held in the same category as necessary expenses and, when allowed, should take its place in the account current, with the probate courts having jurisdiction. *Kenyon v. Gregory*, 127 Ark. 525, 192 S.W. 887 (1917) (decision under prior law).

#### —Contracts Not Binding.

Attorneys were not deprived of a property right without due process of law

where their contract of employment with an administrator for the purpose of filing wrongful death action was terminated by probate court without notice to them or opportunity to be heard after appointment of successor administrator, since the order of court was purely prospective in operation and did not involve denial of due process. *Gentry v. Richardson*, 228 Ark. 677, 309 S.W.2d 721 (1958).

A party has no right to make a contract for legal services which is binding on a court; however a court has the power and jurisdiction to approve a claim for legal services made by a party where the court feels the claim is justified. *Black v. Thompson*, 237 Ark. 304, 372 S.W.2d 593 (1963).

#### —Discretion of Court.

Where there was no order of the probate court authorizing an administrator to employ an attorney, it was in the discretion of the court to allow him credit for fees paid to an attorney, and its order was conclusive where no abuse was shown. *Reynolds v. Canal & Banking Co.*, 30 Ark. 520 (1875) (decision under prior law).

An attorneys' fees award which was less than the statutory standard set out in this section was not an abuse of court's discretion where the bulk of the services performed by the attorneys in the probate proceedings were done on behalf of the executor in its individual capacity to obtain credits for tax payments made out of the in-state assets of the estate. *Estate of Torian v. Smith*, 263 Ark. 304, 564 S.W.2d 521 (1978), cert. denied, *First Nat'l Bank v. Smith*, 439 U.S. 883, 99 S. Ct. 223, 58 L. Ed. 2d 195 (1978).

Where executor's position was in derogation of the interests of the estate as a whole, the trial court abused its discretion in ordering the attorneys' fees to be paid from the assets of the estate. *Croft v. Clark*, 24 Ark. App. 16, 748 S.W.2d 149 (1988).

The probate judge has authority to approve legal fees in excess of the statutory legal fees under subsection (d) and to approve accounting fees under subsection (e). *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991).

No abuse of discretion was shown by the trial court in the allowance of legal fees. *Nabers v. Estate of Setser*, 310 Ark. 194, 833 S.W.2d 375 (1992).

**—Evidence.**

In the absence of proof that executor and attorney fees are unreasonable or in violation of this section, such fees will be affirmed. *Swaffar v. Swaffar*, 327 Ark. 235, 938 S.W.2d 552 (1997), cert. denied, 522 U.S. 820, 118 S. Ct. 73 (1997).

**—Liability of Representative.**

An administrator could not escape personal liability for an attorney's fee by showing that the court did not authorize the employment of the attorney. *Tucker v. Grace*, 61 Ark. 410, 33 S.W. 530 (1895) (decision under prior law).

**—Not Allowed.**

An administrator had no power to bind an estate by an agreement to convey to an attorney a part of the estate as compensation for his professional services in defending an action for the possession of land of the estate. *Bryan v. Craig*, 64 Ark. 438, 44 S.W. 348 (1897) (decision under prior law).

An attorney's fee was not allowed an administrator for resisting a suit to compel him to do his duty. *Jacoway v. Hall*, 67 Ark. 340, 55 S.W. 12 (1900) (decision under prior law).

A probate court was without jurisdiction to allow an attorney for heirs a fee out of assets of an estate for resisting a sale of lands to pay debts. *Paget v. Brogan*, 67 Ark. 522, 55 S.W. 938 (1900) (decision under prior law).

Although the statutory fee schedule was not an inflexible maximum where a fee of \$2,000 for the preparation of estate tax returns was covered by a separate agreement with an individual as beneficiary of the will rather than as executor and it was not authorized or approved by the probate court, the allowance to attorney of fee for administration work in connection with estate in excess of the fee schedule was not justified and attorney was not entitled to the \$2,000 for preparation of estate tax return. *Warfield v. Burnside*, 240 Ark. 316, 399 S.W.2d 676 (1966).

**—Recourse to Equity.**

Where a portion of the heirs and distributees employed an attorney to contest the settlement of the executor, the probate court had no power to direct the payment of the attorney's fee by the executor out of the residuary fund of the estate; if it was a proper case for contribution by all inter-

ested in the estate, the remedy was in chancery only. *McPaxton v. Dickson*, 15 Ark. (2 Barber) 97 (1854) (decision under prior law).

An attorney could, in equity, subject the assets of an estate to the payment of his fee where his services were of value to the estate and the administrator was insolvent. *Pike v. Thomas*, 65 Ark. 437, 47 S.W. 110 (1898) (decision under prior law).

**Expenses.**

An administrator was held to be a trustee and could not profit on claims against the estate; rather, he would be allowed only what he paid for them, plus interest. *Wolf v. Banks*, 41 Ark. 104 (1883) (decision under prior law).

An executor or administrator was entitled to be indemnified out of the assets of the estate for expenditures made or liabilities incurred in the legitimate exercise of his trust. *State ex rel. Altheimer v. Hunter*, 56 Ark. 159, 19 S.W. 496 (1892) (decision under prior law).

**—Funeral.**

Although an executor voluntarily paid the funeral expenses of the deceased, he was entitled to credit therefor as expenses incident to administration of the estate. *Holt v. Cassinelli*, 203 Ark. 1138, 160 S.W.2d 877 (1942) (decision under prior law).

**—Insurance Premiums.**

Allowance of insurance premiums paid by a personal representative was justified. *Holland v. Doke*, 135 Ark. 372, 205 S.W. 648 (1918) (decision under prior law).

**—Personal Expenditures.**

An administrator was entitled to his advances for the estate plus six percent simple interest. *Trimble v. James*, 40 Ark. 393 (1883) (decision under prior law).

**—Preservation of Estate.**

Money expended by an administrator in the preservation of an estate could be allowed as expenses of administration on final settlement, but a representative of a deceased administrator could not collect expenses of administration from an estate unless there had been an accounting. *Smith v. Davis*, 51 Ark. 415, 11 S.W. 681 (1889) (decision under prior law).

An executor not entitled to compensation under a will was entitled to allowance for legitimate expenses incurred in the



care and management of the estate. *Hill v. Zanone*, 184 Ark. 594, 43 S.W.2d 238 (1931) (decision under prior law).

#### —Statement Required.

An administrator was entitled to ordinary expenses, but needed to file an itemized statement showing the necessity therefor. *Scroggins v. Osborn Co.*, 181 Ark. 424, 26 S.W.2d 95 (1930) (decision under prior law).

#### —Traveling.

It was not error to allow an administrator necessary traveling expenses. *Holland v. Doke*, 135 Ark. 372, 205 S.W. 648 (1918) (decision under prior law).

#### Personal Representatives' Fees.

Former statute fixed the compensation of an administrator for his entire trouble and risk in attending to the settlement of an estate, and not merely for collecting its debts. The probate judge could allow as such compensation the maximum percent upon the value of the estate fixed by statute, or he could, in the exercise of sound discretion, allow less than the maximum, according to the circumstances of the case. *Ex parte Bell*, 14 Ark. (1 Barber) 76 (1853) (decision under prior law).

A probate court may fix the compensation to be allowed an administrator, but it cannot exceed the rates set by statute. *Souter v. Fly*, 182 Ark. 791, 33 S.W.2d 408 (1931) (decision under prior law).

Where the successor administrator collected rents and made disbursements, and there was no evidence that it made any discretionary or time-consuming judgments with respect to the management of the real estate, there was no evidence of "substantial services" having been performed; therefore, the successor administrator was not entitled to extra fees in excess of the listed percentages. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 304, 719 S.W.2d 273 (1986).

Circuit court did not abuse its discretion in allowing a coexecutor of a decedent's estate a \$5000 executor's fee, under subsection (c) of this section, because the circuit court considered the proper factors because (1) the coexecutor was found not to have acted so as to intentionally harm the widow and to have provided valuable services to the estate; (2) the circuit court found that the undervaluation of the es-

tate property could have harmed the heirs in terms of estate taxes and that the coexecutor's actions (such as the construction of the will) benefitted some of the heirs to the detriment of other heirs; and (3) the circuit court found that a higher fee was warranted. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

#### —Allowance on Appeal.

Upon appeal from a probate court's confirmation of an administrator's account of settlement, he could be allowed commissions in the circuit court, though he credited himself with none and none were allowed by the probate court. *Williams v. Cubage*, 36 Ark. 307 (1880) (decision under prior law).

#### —Contracts.

An administrator could not bind an estate by contract to pay his fee. *Pike v. Thomas*, 62 Ark. 223, 35 S.W. 212 (1896) (decision under prior law).

#### —Credit for Uncollectible Items.

The destruction or larceny of notes did not entitle the administrator to credit for them; they could still be collected by a suit for lost instruments. *Williams v. Cubage*, 36 Ark. 307 (1880) (decision under prior law).

The fact that an account current was approved without allowing credit for uncollected items did not constitute a final adjudication that such items were collectible, nor preclude an order allowing credit therefor when it was found that the items were uncollectible. *Holland v. Doke*, 135 Ark. 372, 205 S.W. 648 (1918) (decision under prior law).

#### —Determination.

Where evidence was to the effect that executor operated testator's department store for about one year during which time about \$158,000 passed through its hands and there was hardly a day during a two-year period that executor did not perform some duty in connection with the administration of the estate and where the personal property of the estate was valued at \$77,977.98 and the real estate at \$66,000, an executor's fee of \$5,000 was held to be not excessive. However, on rehearing where it was established that the actual operation of the store was un-

der the management of third persons and that the work by the executor was not substantially greater than that usually done by personal representatives the fee was reduced to \$2,489.34 as to the personalty and \$250 as to the realty. *Saad v. Arkansas Trust Co.*, 225 Ark. 33, 280 S.W.2d 894 (1955).

#### —Discounting Claims.

An administrator was not allowed to profit by discounting claims. *Jacoway v. Hall*, 67 Ark. 340, 55 S.W. 12 (1900) (decision under prior law).

#### —Discretion of Court.

Allowance of commissions to executor, for his risk and trouble and for improvements put on testator's real estate, was a matter within the jurisdiction of the probate court, and its judgment was conclusive in the absence of showing fraud in the allowance. *Ringgold v. Stone*, 20 Ark. (7 Barber) 526 (1859) (decision under prior law).

It was within the discretion of the probate court to allow the maximum compensation for services as an administrator, and this discretion would not be disturbed unless abused. *Triplett v. Chipman*, 153 Ark. 12, 240 S.W. 23 (1922) (decision under prior law).

A trial court did not abuse its discretionary authority in allowing only a \$4,000 executor's fee where a five-year delay in administration of an Arkansas estate was primarily due to the executor's initiating the original probate in Mississippi in disregard of advice of counsel. *Estate of Torian v. Smith*, 263 Ark. 304, 564 S.W.2d 521 (1978), cert. denied, *First Nat'l Bank v. Smith*, 439 U.S. 883, 99 S. Ct. 223, 58 L. Ed. 2d 195 (1978).

#### —Foreclosure of Mortgage.

An administrator was not entitled to a commission on the proceeds of a sale of property belonging to his intestate made under a decree in chancery foreclosing a mortgage. *Reynolds v. Canal & Banking Co.*, 30 Ark. 520 (1875) (decision under prior law).

#### —Incorporation by Reference.

Where a will provided that the executor should be allowed such fees as by law are allowed to administrators and executors, the executor was entitled to the fees allowed by statute. *State Nat'l Bank v. Fisher*, 186 Ark. 42, 52 S.W.2d 51 (1932) (decision under prior law).

#### —Limitation in Wills.

A testator could limit the executor's compensation by terms of his will, as statutory provisions applied only when a will did not otherwise provide. *Gordon v. Greening*, 121 Ark. 617, 182 S.W. 272 (1916) (decision under prior law).

#### —Not Allowed.

If nothing passed through an administrator's hands, he was entitled to no fees. *Adamson v. Parker*, 74 Ark. 168, 85 S.W. 239 (1905) (decision under prior law).

The entitlement of an administrator to compensation was questionable where she had not made a proper accounting, where the real property had not become an asset in the hands of the personal representative, where she had not been authorized to operate a business, and by the fact that she would receive and retain all the personal estate. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

#### —Widow.

Where a widow was the administrator of the estate, it did not affect her right to receive commissions. *Sharp v. Himes*, 129 Ark. 327, 196 S.W. 131 (1917) (decision under prior law).

A widow was entitled to only \$3,000 as compensation for her services as executor, pursuant to this section, rather than the statutory maximum of \$49,000, which she computed based on an estate in excess of \$1,770,000, since the evidence showed that she was 87 years old, in poor health, and that her brother, an attorney and accountant, largely performed the work done. *Hanna v. Hanna*, 273 Ark. 399, 619 S.W.2d 655 (1981).

**Cited:** *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986); *Amant v. Callahan*, 341 Ark. 857, 20 S.W.3d 896 (2000).



**28-48-109. Allowances for defending will or prosecuting its probate.**

(a) When any person nominated in a will as executor or the administrator with the will annexed, in good faith defends the will or prosecutes any proceedings for the purpose of having it admitted to probate, whether successful or not, he or she shall be allowed out of the estate his or her necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

(b) If the nominated executor or administrator with the will annexed should fail to defend the will or prosecute proceedings for its probate and one (1) or more interested parties take such action and are successful, then the parties shall be reimbursed out of the estate for their necessary expenses and disbursements including reasonable attorney's fees.

**History.** Acts 1949, No. 140, § 78; 1967, No. 287, § 6; A.S.A. 1947, § 62-2209.

**CASE NOTES****ANALYSIS**

Attorney's Fees Allowed.

Attorney's Fees Not Allowed.

Contractual Arrangement with Beneficiary.

Good Faith.

**Attorney's Fees Allowed.**

Where attorneys appointed by the court to represent an administrator had worked two or three weeks negotiating with the proper authorities for the restoration of a drug and narcotic permit in connection with the operation of a drug store and had had weekly conferences with the administrator over a period from June 21, 1960, through January 31, 1962, an attorney's fee of \$2,500 for such services was justified, it being less than the statutory fee. *Black v. Thompson*, 235 Ark. 725, 361 S.W.2d 753 (1962).

**Attorney's Fees Not Allowed.**

Decedent's brother, who unsuccessfully attempted to probate an allegedly lost will of the decedent, was not entitled to recover fees and expenses under subsection (a) of this section as he was not nominated as the executor of that will and he did not qualify as an administrator with the will annexed as the will was never deemed valid and admitted to probate. *Abdin v.*

*Abdin*, 101 Ark. App. 56, 270 S.W.3d 361 (2007).

**Contractual Arrangement with Beneficiary.**

Where attorneys entered into a contractual arrangement with the principal beneficiary of a will who was also the executor named therein for a contingent fee, they were estopped from pursuing the alternative course of seeking a fee from the decedent's estate on a quantum meruit basis when defense of principal will proved unsuccessful. *Warfield v. Burnside*, 240 Ark. 316, 399 S.W.2d 676 (1966).

**Good Faith.**

The good or bad faith of a person offering a will for probate is not controlling as to the allowance of the attorney fees, but rather the fact that the attorneys were appointed by the court to represent the administrator of the estate and thereafter rendered services in behalf of the estate entitles them to remuneration. *Black v. Thompson*, 235 Ark. 725, 361 S.W.2d 753 (1962).

The record did not support allegation that administrator did not act in "good faith" under this section in offering the will for probate, and, in considering her background, it could not be assumed that she acted in bad faith when in fact she would have been remiss in her duty had

she failed to offer the will for probate, especially where it was not established that she helped procure it. *Black v. Thompson*, 235 Ark. 725, 361 S.W.2d 753 (1962).

SUBCHAPTER 2 — BOND

SECTION.

- 28-48-201. Bond required.
- 28-48-202. Failure to give bond or file acceptance.
- 28-48-203. Sureties.
- 28-48-204. Form.
- 28-48-205. Approval of bond required.

SECTION.

- 28-48-206. Increase or reduction in amount — Dispensing with bond.
- 28-48-207. Obligations.
- 28-48-208. Enforcement of obligations.
- 28-48-209. Agreement to deposit assets.

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety,

shall take effect and be in force from and after its passage and approval."

Acts 1961, No. 17, § 3: Jan. 30, 1961. Emergency clause provided: "It is hereby determined that the present laws pertaining to the requirement of a bond by a personal representative which is a bank are unjust and inadequate, now therefore, this act is necessary to remedy this existing situation and will remedy the same, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force from the date of its approval."

Acts 1975, No. 620, § 16: July 1, 1975.

RESEARCH REFERENCES

- Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 122 et seq.
- C.J.S.** 33 C.J.S., Exec. & Ad., §§ 71-77.

28-48-201. Bond required.

(a) Prior to the issuance of letters and except as provided in § 28-48-206, the court or the clerk, subject to approval or rejection by the court, shall take a bond from the personal representative with two (2) or more sufficient sureties who are residents of this state, or a corporate surety authorized to do business in this state, for the benefit of the interested parties. The bond shall be in an amount fixed by the court not less than double the amount or, if the surety is corporate, then not less than the amount, of the estimated value of the property which may reasonably be expected to pass through the hands of the personal representative.



(b) When two (2) or more persons are appointed personal representatives of the same estate and are required by the provisions of the Probate Code to give a bond, the court may require either a separate bond from each or one (1) bond from all of them.

(c) No personal representative shall be deemed a surety for another personal representative unless the terms of the bond so provide.

**History.** Acts 1949, No. 140, §§ 80, 84; A.S.A. 1947, §§ 62-2211, 62-2215.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

## CASE NOTES

### ANALYSIS

Action on Bond.

Authority of Court.

Contribution by Cosurety.

Death of Surety.

Direction Against Bond in Will.

Discharge of Sureties.

Liability of Guardian.

Necessity of Bond.

### Action on Bond.

A cause of action did not accrue upon an administrator's bond until his accounts were settled and an order made by the court directing him to pay the amount found due to the parties entitled to receive it. *George v. Elms*, 46 Ark. 260 (1885); *State ex rel. McCreary v. Roth*, 47 Ark. 222, 1 S.W. 98 (1886) (preceding decisions under prior law).

When a probate court made a settlement of a deceased administrator's accounts before an administrator was appointed on his estate, neither the principal nor his sureties were legally before the court, and such settlement would not be a cause of action on the bond. *State v. Drake*, 52 Ark. 350, 12 S.W. 706 (1889) (decision under prior law).

If the accounts of an administrator showing nothing due from him were confirmed by the probate court, no liability would rest upon his sureties until the settlement thus made was impeached in a court of equity. *Crouch v. Edwards*, 52 Ark. 499, 12 S.W. 1070 (1889) (decision under prior law).

### Authority of Court.

It was within the power of the probate court, on the application of a surety in an administrator's bond, to require the administrator to give a new bond when it

was made to appear that the sureties in his bond were insufficient. *Renfro v. White*, 23 Ark. (10 Barber) 195 (1861) (decision under prior law).

On affidavit filed by interested party in an estate that the administrator was insolvent, it was error for the probate court to revoke the letters of administration without requiring the administrator to give additional bond and without showing that his securities were not ample. *Collier v. Kilcrease*, 27 Ark. 10 (1871) (decision under prior law).

A probate court had no authority, on application of guardian, to substitute new bonds and sureties for old bonds and sureties theretofore approved and accepted by it for reasons which are not provided by statute. *White v. New Amsterdam Cas. Co.*, 195 Ark. 249, 111 S.W.2d 477 (1937) (decision under prior law).

### Contribution by Cosurety.

Where a surety upon a guardian's bond who had been compelled to pay over money due by the guardian upon termination of the fiduciary relation sued his cosurety for contribution, it was no defense that the plaintiff consented that the guardian might retain and use the ward's money by paying interest therefor and that the probate court thereupon made an order reciting such consent and authorizing the guardian to retain the money "until further order." *Berton v. Anderson*, 56 Ark. 470, 20 S.W. 250 (1892) (decision under prior law).

### Death of Surety.

The liability of a surety on an administrator's bond was not discharged by the surety's death, but extended to the entire term of the administrator. *Hecht v. Scaggs*, 53 Ark. 291, 13 S.W. 930 (1890) (decision under prior law).

**Direction Against Bond in Will.**

Where a will provided for appointment of widow as executor without giving bond and without making reports and settlements, the remainderman in the estate had no right to require a bond and an accounting from the widow who was a life tenant, without alleging and proving mismanagement, waste, or conversion. *Dillen v. Fancher*, 197 Ark. 995, 125 S.W.2d 110 (1939) (decision under prior law).

Where letters testamentary were granted by the clerk, in vacation, he had no discretion in any case to dispense with the bond required by statute, even where the will directed otherwise; rather, in such matters the probate court had a large discretion, which would not be controlled by the Supreme Court, unless abused. *Dillen v. Fancher*, 197 Ark. 995, 125 S.W.2d 110 (1939) (decision under prior law).

**Discharge of Sureties.**

The sureties on an administrator's bond could apply to the probate court to be discharged on any statutory ground; however, such an application could not be made under a former statute relating to the discharge of sureties on official bonds. *Valcourt v. Sessions*, 30 Ark. 515 (1875) (decision under prior law).

Where guardian and sureties were be-

fore the probate court and an order permitting substitution of surety, approving new bond, and releasing the sureties on the original bond was made by the court of its own motion, but not entered on the record, an order nunc pro tunc, directing that it be shown on the judgment record, was proper, but the order did not discharge former sureties from liability that might have accrued prior to the order. *Williams v. Goodwin*, 200 Ark. 897, 141 S.W.2d 515 (1940) (decision under prior law).

**Liability of Guardian.**

The primary liability of a guardian who had been removed by the court should have been determined before a judgment was entered against the surety on the guardian's bond. *Continental Ins. Cos. v. Estate of Rowan*, 250 Ark. 724, 466 S.W.2d 942 (1971).

**Necessity of Bond.**

The giving of a bond by a guardian was held to be a condition precedent to the issuance of letters of guardianship and the authority to act as a guardian. *Norris v. Dunn*, 184 Ark. 511, 43 S.W.2d 77 (1931) (decision under prior law).

**Cited:** *Sulcer v. Northwestern Nat'l Ins. Co.*, 263 Ark. 583, 566 S.W.2d 397 (1978).

**28-48-202. Failure to give bond or file acceptance.**

If at any time a personal representative fails to give a bond as required by the court or, if no bond is required, fails to file written acceptance of his or her appointment within the time fixed by the court, some other person shall be appointed in his or her stead. If letters have been issued, they shall be revoked.

**History.** Acts 1949, No. 140, § 87; A.S.A. 1947, § 62-2218.

**CASE NOTES****Failure to Furnish Bond.**

Where an administrator fails to furnish bond and otherwise fails to qualify as administrator, the court has full power to

remove the administrator on its own initiative. *Davis v. Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959).



28-48-203. Sureties.

(a) Unless authorized by special order of the court, no sheriff, clerk of any court, the deputy of either, the judge of any court, or attorney at law shall be taken as surety on the bond of a personal representative.

(b)(1) A surety upon the bond of a personal representative desiring to be released from subsequent liability shall serve upon the personal representative a notice that, on and after a date fixed in the notice, which date shall be not less than twenty (20) days from the date of service, the surety will withdraw as surety upon the bond. A copy of the notice of withdrawal shall be filed in the court immediately.

(2) On and after 12 noon of the termination date fixed in the notice, the surety shall be released from liability on the bond for subsequent acts or defaults of the personal representative, and, unless before noon of the termination date a new bond with sufficient surety shall be filed and approved, the personal representative shall ipso facto be removed, and a successor shall be appointed.

(3) However, the surety shall not be released from liability until the personal representative shall have furnished a new bond with surety approved by the court, or until his or her successor has been appointed, has qualified, and has taken over the assets of the estate, or until a final settlement of his or her principal has been approved.

(c)(1) The original sureties shall be liable for all breaches of the obligation of the bond up to the time of filing of the new bond and approval of the bond by the court, but they shall not be liable for acts and omissions of the personal representative thereafter.

(2) The new bond shall bind the sureties thereon with respect to acts and omissions of the personal representative from the time when the sureties on the original bond are no longer liable therefor or from such prior time as the court directs.

**History.** Acts 1949, No. 140, §§ 85, 89; A.S.A. 1947, §§ 62-2216, 62-2220.

CASE NOTES

**Relief from Original Liability.**

An additional or second administration bond entered into by order of the probate court on the death of a security in the first bond, whether upon or without the com-

plaint of an interested party, relieved the securities in the first bond from all liability occurring after execution of the second bond. *State v. Stroop*, 22 Ark. (9 Barber) 328 (1860) (decision under prior law).

28-48-204. Form.

With appropriate variations in the case of an executor, administrator with will annexed, or other special case, the bond of the personal representative shall be in substantially the following form:

In the Circuit Court of ..... County, Arkansas.

Bond of Personal Representative

The undersigned .....as principal, having been appointed administrator of the estate (executor of the will) of ....., deceased, and .....as sureties, acknowledge themselves to be jointly and severally obligated to the State of Arkansas, for the use and benefit of all persons interested in said estate in the penal sum of .....DOLLARS (\$....) conditioned as follows:

If the undersigned administrator (executor) shall well and faithfully account for his administration of said estate, as by law required, this bond shall become null and void, otherwise to remain in full force and effect.

Dated this ....day of ....., 20....

..... as principal.  
..... as surety.  
..... as surety.

Approved this ....day of ....., 20....

**History.** Acts 1949, No. 140, § 83; A.S.A. 1947, § 62-2214.

**Cross References.** Bonds not void for want of form, § 16-68-204.

CASE NOTES

**Sufficiency.**

An administrator's bond was held to be a statutory bond; if insufficient by reason of any inadvertent omission from its express terms, such deficiency had to be deemed as supplied by the law, and addi-

tions to the bond not authorized by law would be declared as surplusage. *Meyer v. Fidelity & Deposit Co.*, 197 Ark. 418, 122 S.W.2d 586 (1938) (decision under prior law).

**28-48-205. Approval of bond required.**

(a) No bond of a personal representative shall be deemed sufficient unless it shall have been examined and approved by the court, or by the clerk, subject to confirmation by the court, and the approval is endorsed thereon.

(b) Before giving approval of a bond executed by personal sureties, the court or clerk shall require affidavits from the sureties that they collectively own property in this state subject to execution of a value over and above their liabilities and equal to the amount of the bond.

(c) In the event the bond is not approved, the personal representative, within such time as the court or the clerk may direct, shall secure a bond with satisfactory surety or sureties.

**History.** Acts 1949, No. 140, § 86; 1951, No. 255, § 7; A.S.A. 1947, § 62-2217.



**RESEARCH REFERENCES**

**Ark. L. Rev.** Probate Code Amendments, 5 Ark. L. Rev. 377.

**CASE NOTES****Substitutions of Sureties.**

A probate court had no authority, on application of a guardian, to substitute new bonds and sureties for old bonds and sureties theretofore approved and accepted by it, for reasons which were not provided by statute. *White v. New Amsterdam Cas. Co.*, 195 Ark. 249, 111 S.W.2d 477 (1937) (decision under prior law).

Where guardian and sureties were before the probate court and an order permitting substitution of surety, approving

new bond, and releasing the sureties on the original bond was made by the court of its own motion, but not entered on the record, an order nunc pro tunc, directing that it be shown on the judgment record, was proper; but the order did not discharge former sureties from liability that might have accrued prior to the order. *Williams v. Goodwin*, 200 Ark. 897, 141 S.W.2d 515 (1940) (decision under prior law).

**28-48-206. Increase or reduction in amount — Dispensing with bond.**

(a) The court may at any time increase or decrease the amount of the bond required of a personal representative when good cause appears.

(b) At its discretion and subject to subsequent revocation, the court may dispense with the requirement of a bond when, by the terms of the will, the testator directed or requested that no bond be required of the personal representative.

(c)(1) Except with respect to a nonresident administrator, the court, at its discretion and subject to subsequent revocation, may reduce the amount of bond which would otherwise be required or dispense with the requirement of a bond:

(A) If the personal representative is a bank or a trust company whose deposits are insured by the Federal Deposit Insurance Corporation or a trust company chartered and regulated by an appropriate state authority; or

(B) When all distributees are competent and have filed their written waiver of the requirement of bond, and the petition shall recite that there are no known unsecured claims.

(2) However, if any person asserting a claim against the estate or having or claiming any interest in the estate files a written demand, the personal representative shall give bond as required in § 28-48-201 or in such other amount as the court shall direct after considering the amount of the alleged claim or asserted interest, but, if it is shown to the court that the alleged claim is invalid or has been paid or that the person alleging the interest in the estate has, in fact, no interest therein, then bond shall not be required.

**History.** Acts 1949, No. 140, §§ 81, 88; 1975, No. 620, § 10; 1979, No. 384, § 1; 1951, No. 54, § 1; 1951, No. 255, § 6; A.S.A. 1947, §§ 62-2212, 62-2219; Acts 1961, No. 17, § 1; 1967, No. 287, § 7; 1999, No. 635, § 1.

## RESEARCH REFERENCES

**Ark. L. Rev.** Probate Code Amendments, 5 Ark. L. Rev. 377.

## CASE NOTES

## ANALYSIS

Cause for Substitution of Sureties.  
Entry of Record.  
Written Demand.

**Cause for Substitution of Sureties.**

A probate court had no authority, on the application of a guardian, to substitute new bonds and sureties for old bonds and sureties theretofore approved and accepted by it, for reasons which were not provided by statute. *White v. New Amsterdam Cas. Co.*, 195 Ark. 249, 111 S.W.2d 477 (1937) (decision under prior law).

**Entry of Record.**

Where the guardian and sureties were before the probate court and an order permitting substitution of surety, approving new bond, and releasing the sureties on the original bond was made by the court of its own motion, but not entered on the record, an order nunc pro tunc, directing that it be shown on the judgment

record, was proper; but the order did not discharge the former sureties from liability that might have accrued prior to the order. *Williams v. Goodwin*, 200 Ark. 897, 141 S.W.2d 515 (1940) (decision under prior law).

**Written Demand.**

An order requiring a personal representative to secure a bond was proper and did not constitute a deprivation of due process where (1) the appellees complied with subsection (c)(2) by filing their written demand (i.e., their administrative claim) and petitioning the probate court for an order directing the estate's assets be returned or, alternatively, requiring the personal representative to secure a bond, (2) the petition was served upon the personal representative, and (3) the probate court held a hearing on the petition and granted the relief sought in the petition. *Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 35 S.W.3d 315 (2000).

**28-48-207. Obligations.**

(a) The bond of the personal representative shall run to the State of Arkansas for the use of all persons interested in the estate and shall be for the security and benefit of such persons.

(b) The sureties shall be jointly and severally liable with the personal representative and with each other.

**History.** Acts 1949, No. 140, § 83; A.S.A. 1947, § 62-2214.

## CASE NOTES

**Personal Representative in Succession.**

An administrator in succession was not charged with the illegal acts of his predecessor to the extent that he, if he accepted the trust when appointed and when he made bond, had to take such trust coupled

with the mandatory duty to determine the legality or illegality of his predecessor's conduct and act accordingly. *Meyer v. Fidelity & Deposit Co.*, 197 Ark. 418, 122 S.W.2d 586 (1938) (decision under prior law).



28-48-208. Enforcement of obligations.

(a) The execution of the bond of a personal representative shall be deemed an appearance by the surety in the proceeding for the administration of the estate, but he or she shall be entitled to receive notices of all hearings with respect to his or her liability under the bond.

(b)(1) Subject to the provisions of subsection (c) of this section, upon breach of the obligation of the bond of the personal representative and after notice to the obligors on the bond and to such other persons as the court may direct, the court may summarily as a part of the proceeding for the administration of the estate determine the damages, enter judgment therefor against the obligors on the bond, and by appropriate process enforce the collection thereof.

(2) The determination and enforcement may be made by the court upon its own motion or upon application of a successor personal representative, or of any other interested person.

(3) The court may hear the application at the time of settling the accounts of the defaulting personal representative or at such other time as the court may direct.

(4) Damages shall be assessed in behalf of all interested persons and may be paid over to the successor or other nondefaulting personal representative and distributed as other assets held by the personal representative in his or her official capacity.

(5) The same remedies shall be available against a defaulting personal representative irrespective of whether there is a bond.

(c) If the estate is already distributed, or if for any reason the procedure to recover on the bond provided in subsection (b) of this section is inadequate, or at his or her election, an interested person may bring a separate suit in a court of competent jurisdiction in his or her own behalf for damages suffered by him or her by reason of the default of the personal representative.

(d) The bond of the personal representative shall not be void upon the first recovery but may be proceeded upon from time to time until the whole penalty is exhausted.

**History.** Acts 1949, No. 140, § 90;  
A.S.A. 1947, § 62-2221.

CASE NOTES

ANALYSIS

Accrual of Action on Bond.  
Liability of Sureties.  
Order of Distribution.  
Prerequisite to Suit.  
Revivor.  
Rights of Distributees.  
Subrogation.

**Accrual of Action on Bond.**

The statute of limitations did not begin to run in favor of a surety on a deceased

guardian's bond until there was a final settlement of the guardian's accounts in the probate court and an order to pay over the balance due the ward. *State ex rel. Davis v. Buck*, 63 Ark. 218, 37 S.W. 881 (1896); *Rhea v. Bagley*, 66 Ark. 93, 49 S.W. 492 (1899) (decisions under prior law).

Upon termination of the guardianship relation and an adjustment of the accounts and establishment of the amount due from the guardian, the cause of action accrued at once, if there was some person

capable of suing; if there was no such person, then the cause of action was postponed until there was someone capable of suing. *Wallace v. Swepston*, 74 Ark. 520, 86 S.W. 398 (1905) (decision under prior law).

#### **Liability of Sureties.**

Where a guardian secured a new bond, but there was no discharge of old bond, both sets of bondsmen could have been liable. *Beakley v. Cunningham*, 112 Ark. 71, 165 S.W. 259 (1914) (decision under prior law).

#### **Order of Distribution.**

An order of a probate court ascertaining amount of funds in hands of administrator and directing him to pay the funds into court for benefit of heirs, without naming them, was not an order of distribution sufficient to authorize heirs to sue on administrator's bond to recover funds for their own use. *Ferguson v. Carr*, 85 Ark. 246, 107 S.W. 1177 (1908) (decision under prior law).

#### **Prerequisite to Suit.**

A suit could not be brought on a bond until there was an order of the probate court to pay over. *Connelly v. Weatherford*, 33 Ark. 658 (1878); *Vance v. Beattie*, 35 Ark. 93 (1879); *State ex rel. Davis v. Buck*, 63 Ark. 218, 37 S.W. 881 (1896); *Beakley v. Cunningham*, 112 Ark. 71, 165 S.W. 259 (1914) (decisions under prior law).

The settlement by the probate court of a deceased guardian's account was sufficient to support an action against his surety for the amount found due, though no order of payment was made. *Smith v. Smithson*, 48 Ark. 261, 3 S.W. 49 (1887) (decision under prior law).

The rule that a cause of action against a surety on a guardian's bond did not accrue until the amount of the liability was established by an order of the probate court and an order was made by such court directing the amount to be paid over was

limited, so far as the prerequisite of an order to pay over was concerned, to settlements which were not final and where the guardianship was left continuing. *Wallace v. Swepston*, 74 Ark. 520, 86 S.W. 398 (1905) (decision under prior law).

An action on a bond was not maintainable until the probate court had adjusted the accounts of the administrator and ordered him to pay over the amount found to be in his hands. *Planters' Mut. Ins. Ass'n v. Harris*, 96 Ark. 222, 131 S.W. 949 (1910) (decision under prior law).

#### **Revivor.**

Statute for reviving judgment against administrators held not to apply to probate judgments. *Rose v. Thompson*, 36 Ark. 254, 1880 Ark. LEXIS 90 (1880), overruled in part, *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973) (decision under prior law).

#### **Rights of Distributees.**

A distributee of an estate was not entitled to bring an action against the administrator for waste or conversion of the assets without showing that the claims of creditors had been satisfied; however, if judgment was obtained, the amount recovered should have been paid to the administrator in succession, to be distributed under direction of the probate court. *Brice v. Taylor*, 51 Ark. 75, 9 S.W. 854 (1888) (decision under prior law).

The failure of administrator to comply with an order of distribution was such a breach of his bond as justified action by a distributee. *Ferguson v. Carr*, 85 Ark. 246, 107 S.W. 1177 (1908) (decision under prior law).

#### **Subrogation.**

Sureties upon a deceased guardian's bond who had been forced to make good his default would be subrogated to the remedy of the ward against the guardian's homestead. *State ex rel. Luck v. Atkins*, 53 Ark. 303, 13 S.W. 1097 (1890) (decision under prior law).

### **28-48-209. Agreement to deposit assets.**

It shall be lawful for the personal representative to agree with his or her surety for the deposit of any or all moneys and other assets of the estate with a bank, safe deposit, or trust company authorized by law to do business as such, or other depository approved by the court if the deposit is otherwise proper, in such manner as to prevent the with-



drawal of the moneys or other assets without the written consent of the surety or on order of the court made on such notice to the surety as the court may direct. However, the agreement shall not alter the liability of the personal representative or surety as fixed by the bond.

**History.** Acts 1949, No. 140, § 82;  
A.S.A. 1947, § 62-2213.

SUBCHAPTER 3 — PUBLIC ADMINISTRATORS

SECTION.	SECTION.
28-48-301. Sheriff.	28-48-304. Accounting to regular personal representative.
28-48-302. Inventory and administration.	
28-48-303. Bond.	28-48-305. Expiration of sheriff's term.

RESEARCH REFERENCES

<b>Am. Jur.</b> 31 Am. Jur. 2d, Exec. & Ad., § 607 et seq.	<b>C.J.S.</b> 34 C.J.S., Exec. & Ad., § 974 et seq.
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28-48-301. Sheriff.

- (a) By virtue of his or her office, the sheriff shall be public administrator in his or her county.
- (b) It shall be the duty of the public administrator to take custody of all property of every kind in the county belonging to a deceased person if:
  - (1) The person dies or is found dead in the county without known spouse or next of kin and no qualified person petitions the court for grant of administration;
  - (2) The person, though dying elsewhere, leaves any property in the county which is exposed to loss or damage or is not in the custody of some responsible person; or
  - (3) For any other reason, the circuit court shall direct him or her to take custody of property.

**History.** Acts 1949, No. 140, § 174;  
A.S.A. 1947, § 62-3001.

CASE NOTES

ANALYSIS	Refusal to Administer.
Appointment Unnecessary.	<b>Appointment Unnecessary.</b>
Assumption of Administration.	A sheriff could act as public administrator by virtue of his office without appointment by the probate court. <i>Elmore v.</i>
Jurisdiction of Probate Court.	
Power Generally.	

Bishop, 184 Ark. 243, 42 S.W.2d 399 (1931) (decision under prior law).

#### **Assumption of Administration.**

Until the sheriff assumed the duty of administering or was directed by the court to do so, he did not become the administrator of a particular estate and could not be required to allow or reject a claim against it. *Williamson v. Furbush*, 31 Ark. 539 (1876) (decision under prior law).

The general power to act as public administrator could be assumed by the sheriff taking the property into possession, if necessary, to prevent waste or he could do so upon the order of the probate court. *Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931) (decision under prior law).

#### **Jurisdiction of Probate Court.**

A public administrator could, in the first instance, act on his own judgment, but the probate court had jurisdiction to determine all questions arising in the progress

of the administration. *Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931) (decision under prior law).

#### **Power Generally.**

A public administrator had no more or greater power, authority, or rights than other administrators. *State v. Rottaken*, 34 Ark. 144 (1879) (decision under prior law).

#### **Refusal to Administer.**

Where there was no administration upon an estate, and the sheriff refused to administer, and the creditor was a non-resident and could not administer, they afforded no grounds for chancery to assume jurisdiction to administer the estate. The probate court had exclusive original jurisdiction, and the sheriff could be compelled to administer. *Flash, Lewis & Co. v. Gresham*, 36 Ark. 529 (1880) (decision under prior law).

### **28-48-302. Inventory and administration.**

The public administrator shall make an inventory of all property of a decedent taken into his or her custody and administer and account for it according to the provisions of the Probate Code for the administration of estates of decedents.

**History.** Acts 1949, No. 140, § 175; A.S.A. 1947, § 62-3002.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

### **CASE NOTES**

#### **ANALYSIS**

Liability.

Settlement of Account.

#### **Liability.**

Where the sheriff took charge of the estate and filed a settlement showing him indebted to the distributees, he was not relieved from liability for the amount so shown to be due by the fact that no record was found showing the administration.

*Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931) (decision under prior law).

#### **Settlement of Account.**

An order of the probate court approving the settlement of a sheriff as public administrator indorsed on the back of the settlement was a valid judgment although not recorded. *Elmore v. Bishop*, 184 Ark. 243, 42 S.W.2d 399 (1931) (decision under prior law).

### **28-48-303. Bond.**

The sheriff and the sureties on his or her official bond shall be responsible for each estate for which he or she acts as public administrator for the faithful performance of his or her duties as such. However, the court in the exercise of its discretion may require him or her to file



a bond as is provided in the Probate Code to be filed by a general personal representative, and the liability of the sureties on the special bond, if any, shall be exhausted before resort to the official bond.

**History.** Acts 1949, No. 140, § 176; A.S.A. 1947, § 62-3003.

referred to in this section, is codified as set out in the note following § 28-1-101.

**Publisher's Notes.** The Probate Code,

### CASE NOTES

#### **Liability.**

The bond of a sheriff executed in his capacity of public administrator was primarily liable for any losses resulting from his failure to comply with its conditions,

and remedies on it had to be exhausted before recourse could be had to his official bond as sheriff. *Briggs v. Manning*, 80 Ark. 303, 80 Ark. 304, 97 S.W. 289 (1906) (decision under prior law).

### **28-48-304. Accounting to regular personal representative.**

Upon the appointment of a general personal representative in an estate for which the public administrator is acting, the administrator shall account for and deliver to the general personal representative all of the property of the estate in his or her hands.

**History.** Acts 1949, No. 140, § 177; A.S.A. 1947, § 62-3004.

### **28-48-305. Expiration of sheriff's term.**

If, at the expiration of his or her term of office, a sheriff is acting as public administrator of any estate, he or she shall conclude the administration of the estate within six (6) months of the expiration of his or her term if possible. Otherwise, he or she shall file his or her account and deliver to his or her successor in office the property of the estate in his or her hands.

**History.** Acts 1949, No. 140, § 178; A.S.A. 1947, § 62-3005.

## CHAPTER 49

### MANAGEMENT OF ASSETS

#### SECTION.

28-49-101. Possession by personal representative.

28-49-102. Treatment of certain property as real or personal.

28-49-103. Discovery of assets.

28-49-104. Settlements.

28-49-105. Recovery for property embezzled or converted.

28-49-106. Abandonment of property.

28-49-107. Property not paid for.

28-49-108. Mortgaged property.

#### SECTION.

28-49-109. Fraudulent conveyances.

28-49-110. Inventories.

28-49-111. Debt of executor.

28-49-112. Continuation of business.

28-49-113. Power to borrow money.

28-49-114. Performance of decedent's contracts of sale.

28-49-115. Investment of funds.

28-49-116. Bank deposits.

28-49-117. Authority to execute joint tax returns.

**Preambles.** Acts 1961, No. 424, contained a preamble which read: "Whereas, due to the changed nature of the economy of Arkansas, it is no longer true that real property constitutes the sound core of the assets of most estates; and in many instances the estate of a decedent now includes investments represented by personal property more desirable than certain types of real property to be preserved for distribution to the heirs at law or beneficiaries of the will of the decedent; and by the provisions of the Probate Code it was the intention of the General Assembly of Arkansas of 1949 to give suitable recognition to this change; but it now appears that apparently conflicting provisions in that Code have given rise to ambiguity and uncertainty of interpretation thereof;

"Now, therefore...."

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

### RESEARCH REFERENCES

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 196 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

Tax Problems of the Personal Representative, 16 Ark. L. Rev. 364.

Analyzing the Estate, 21 Ark. L. Rev. 1.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

**C.J.S.** 33 C.J.S., Exec. & Ad., § 121 et seq.

## 28-49-101. Possession by personal representative.

(a) A personal representative shall have the right to, and shall, take possession of all of the personal property of the estate of the decedent, subject to the rights of dower and curtesy and statutory allowances of the surviving spouse or minor children, if any.

(b)(1) Real property shall be an asset in the hands of the personal representative when so directed by the will, if any, or when the court finds that the real property should be sold, mortgaged, leased, or exchanged for any purpose enumerated in § 28-51-103, irrespective of whether any personal property of the estate, other than money, is available for such a purpose.

(2) When real property has become an asset in the hands of the personal representative as provided in this section or when and as long as the court finds it necessary for the preservation of the property, for protecting the rights and interests of persons having interests therein, or for the benefit of the estate, the personal representative may collect rents and earnings from the property, pay taxes and special assessments thereon, make necessary repairs thereon, maintain the property in tenantable condition, preserve it against deterioration, protect it by insurance, and maintain or defend an action for the possession of the



property, or to determine or protect the title until the real property is sold, mortgaged, leased, exchanged, or is delivered to the distributees thereof, or until the estate is settled.

(c) Unless sold, mortgaged, leased, or exchanged by the personal representative pursuant to other provisions of the Probate Code, the real property shall not be distributable by the personal representative.

**History.** Acts 1949, No. 140, § 94; 1961, No. 424, § 1; A.S.A. 1947, § 62-2401.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

**Cross References.** Parties plaintiff and defendant, Arkansas Rules of Civil Procedure 17.

## CASE NOTES

### ANALYSIS

Applicability.

—Personalty.

—Realty.

Applicability.

—Realty.

Bankruptcy.

Ejectment.

Execution of Mortgage.

Foreign Representatives.

Leases.

Parties.

Pleadings.

Purchases by Representatives.

Recovery of Proceeds.

Recovery of Property.

Recovery of Rents.

Rights of Heirs.

Sale of Property.

Suits for Partition.

Unlawful Detainer.

### Applicability.

Where defendant also served as a co-executrix of her mother's estate, subdivision (b)(2) of this section permitted her to preserve and maintain real property in the estate, but where the title to the real property vested in defendant immediately on her mother's death, the circuit court erred in approving any expenditures for the property made after the mother's death. *Monk v. Griffin*, 92 Ark. App. 320, 213 S.W.3d 651 (2005).

Where decedent's will devised her real property to her daughter so long as she outlived her brother, the property passed to decedent's daughter and vested in fee simple absolute; the property was not an

asset in the hands of the estate representative for purposes of this section. Therefore, a receipt for assets of the estate signed by the family after decedent's death did not constitute a family settlement agreement which altered the terms of decedent's will. *Butler v. Dike*, 2009 Ark. App. 435, 320 S.W.3d 647 (2009).

### —Personalty.

Title to personal property of an intestate became vested in the personal representative when appointed and remained so vested until distribution upon proper order of the probate court; heirship was determined at the time of distribution. *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950) (decision under prior law).

### —Realty.

An administrator had no control of an intestate's lands, nor the rents thereof, when they were not needed for the payment of debts. *Stewart v. Smiley*, 46 Ark. 373 (1885); *Hamilton Coal & Coke Co. v. Johns*, 175 Ark. 1146, 1 S.W.2d 812 (1928); *Mayo v. Bank*, 188 Ark. 330, 65 S.W.2d 549 (1933) (preceding decisions under prior law).

An administrator was not entitled to possession of lands of which his intestate had only a naked legal title without substantial interest. *Chowning v. Stanfield*, 49 Ark. 87, 4 S.W. 276 (1886) (decision under prior law).

An administrator could not stand for or represent the heirs when the title to land was involved, nor was he entitled to the possession of lands unless they were needed to pay debt of the deceased. *Jones v. Jones*, 107 Ark. 402, 155 S.W. 117 (1913) (decision under prior law).

While lands were assets in the hands of an executor or administrator for purpose of payment of debts of estate, yet the title to the lands passed direct to the heirs upon death of an intestate subject only to right of administrator to have the lands sold if it was necessary for payment of the decedent's debts. *Pfaff v. Heizman*, 218 Ark. 201, 235 S.W.2d 551, 23 A.L.R.2d 957 (1951) (decision under prior law).

The provisions of this section were not designed to make an administrator automatically entitled to the real estate of a deceased intestate and did not change the rule that legal title to an intestate's land upon his death vests and descends to his heirs at law, subject to the widow's dower and the payment of debts through his administrator. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

Under this section, real property is an asset in the hands of an administrator only when a court finds that it should be sold, mortgaged, leased, or exchanged for purposes stated in § 28-51-103. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

Only when real property has become an asset in an administrator's hands may he, in the language of this section, maintain or defend an action for the possession thereof, or to determine or protect the title thereto. *Estate of Knott v. Jones*, 14 Ark. App. 271, 687 S.W.2d 529 (1985).

### **Applicability.**

#### **—Realty.**

By failing to challenge a land-sale agreement which involved the transfer of property by the decedent to the executrix's daughter less than 2 years before the decedent's death, the executrix did not completely discharge her duty to marshal all assets of the estate. *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998).

#### **Bankruptcy.**

Where the estate of a deceased was, in the course of administration, with unpaid debts for which the land was liable, and physical possession of the land was in a person claiming under a deed of heirs at law of the decedent who filed a voluntary petition in bankruptcy more than four months before the probate court obtained jurisdiction, it was held that the bankruptcy court did not have jurisdiction to enjoin the probate court from selling the

land for the debts of the estate. *Bank of Hamburg v. Tri-State Sav. & Loan Ass'n*, 69 F.2d 436 (8th Cir. 1934) (decision under prior law).

#### **Ejectment.**

An administrator was entitled to the possession of any real estate of which his intestate died seized and could maintain ejectment against the heirs at law, except the widow or her tenant occupying the mansion and farm attached before the assignment of dower. *Carnall v. Wilson*, 21 Ark. (8 Barber) 62 (1860) (decision under prior law).

The legal title to an intestate's lands, upon his death, descended to and vested in his heirs at law, subject to the widow's dower and the payment of debts through his administrator. Except against the widow's dower, the administrator could, until the debts were all paid, enforce his right to the possession thereof by maintaining or defending an ejectment action. *Culberhouse v. Shirey*, 42 Ark. 25 (1883) (decision under prior law).

The lands of a decedent were assets in the hands of an executor or administrator and deemed in his possession and subject to his control for the payment of debts of the decedent; the administrator could maintain ejectment to recover possession of lands when necessary for the payment of the debts of the estate without joining the heirs in the suit. *Burton v. Gorman*, 125 Ark. 141, 188 S.W. 561 (1916) (decision under prior law).

#### **Execution of Mortgage.**

Before a probate court could acquire jurisdiction to authorize an administrator to mortgage real property, a petition had to show that indebtedness to be paid from proceeds for the loan constituted a lien at the time the intestate died, unless the court order recited that independent evidence was presented showing a jurisdictional fact. *Reed v. Futrall*, 195 Ark. 1044, 115 S.W.2d 542 (1938) (decision under prior law).

Where an order was entered by the probate court which authorized the executor to borrow funds for purposes which fell within those permissible ones listed in § 28-51-103, the mortgaged land became an asset in the hands of the executor and subject to the probate court's jurisdiction under subdivision (b)(1). *Rowland v. Farm*



Credit Bank, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

Where the court authorized the mortgaging of real estate which was an asset in the hands of the executor, for purposes which were not themselves authorized by statute, it did not serve to oust the court of jurisdiction or to render its order void and subject to collateral attack. *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

### Foreign Representatives.

A foreign administrator could not sue for possession of intestate's lands in this state. *Fairchild v. Hagel*, 54 Ark. 61, 14 S.W. 1102 (1890) (decision under prior law).

### Leases.

In an administrator's suit to recover the royalty on coal lands of the intestate leased for five years to the defendant, in which it was claimed that the lease was void because the lands were not assets in the administrator's hands and could not be leased by the administrator without a court order, it was held that, since the defendant had possession of the land for three years under the lease and had paid royalties for two years, the relation of landlord and tenant was established and the lease was enforceable. *Hamilton Coal & Coke Co. v. Johns*, 175 Ark. 1146, 1 S.W.2d 812 (1928) (decision under prior law).

An administrator was without authority to execute a lease of lands which were in his hands only for the purpose of paying debts. *Bingham v. Rhea*, 201 Ark. 200, 143 S.W.2d 1087 (1940) (decision under prior law).

### Parties.

In an action by an administrator for the possession of lands claimed by his intestate, he could have his right to possession for the purpose of administration determined without the heirs being parties, inasmuch as such actions only affected the mere right to possession between the parties; however, when the title was affected, the heirs were necessary parties. *Chowning v. Stanfield*, 49 Ark. 87, 4 S.W. 276 (1886) (decision under prior law).

A personal representative who was timely substituted as the plaintiff in an estate's suit for an injunction had a property interest, giving her standing to sue as

the real party in interest. *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997).

Judgment creditors were indispensable parties to a suit to enjoin the administrator from selling the real property of the estate for the payment of their judgments. *Evans v. Gorman*, 115 F. 399 (C.C.E.D. Ark. 1902) (decision under prior law).

A decedent's administrator was a necessary party to a suit for specific performance of an alleged oral contract whereby the decedent was to convey to the plaintiff all the decedent's real and personal property for the plaintiff's services where the administrator claimed the right of possession of the realty to pay the estate debts. *Jensen v. Housley*, 207 Ark. 742, 182 S.W.2d 758 (1944) (decision under prior law).

### Pleadings.

Where a decedent, prior to his death, became indebted on a note to the defendant and at the same time executed a deed to the defendant, a complaint by the administrator of decedent's estate which alleged that personal assets of the estate were insufficient to pay the debts of the estate and which further alleged that deed was a mortgage and that land was an asset of the estate subject to the mortgage of the defendant, asked that the court declare the deed a mortgage and that defendant be required to foreclose the mortgage, and requested that, upon sale, the surplus be turned over to the plaintiff as administrator stated a good cause of action. *Tyler v. Morgan*, 214 Ark. 667, 217 S.W.2d 606 (1949) (decision under prior law).

Allegation in suit by an administrator to recover personalty from defendants that defendants had received and converted personalty of deceased stated good cause of action under this section. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

Where there was no allegation that the property in question had ever become an asset in the hands of an administrator, the administrator was not entitled, under this section, to maintain an action to recover real property of decedent allegedly obtained by defendants by duress and undue influence on the decedent. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

### Purchases by Representatives.

Where the property of a decedent was sold by order of a chancery court, an

administrator could not purchase at the sale. *Reeder v. Meredith*, 78 Ark. 111, 93 S.W. 558 (1906); *Eagle v. Terrell*, 95 Ark. 434, 130 S.W. 550 (1910) (preceding decisions under prior law).

### **Recovery of Proceeds.**

A probate court has the authority to order and direct an administrator to bring suit for benefit of an estate to recover proceeds from the sale of land which a person has obtained from decedent by means of confidential relationship, duress, fraud, misrepresentation, and undue influence and while decedent was mentally incompetent. *Health Betterment Found. v. Thomas*, 225 Ark. 529, 283 S.W.2d 863 (1955).

Under this section, a probate court has jurisdiction to order an executor to collect a promissory note given for rent on devised lands and distribute the proceeds among the devisees. *Pigue v. Grooms*, 248 Ark. 262, 451 S.W.2d 181 (1970).

### **Recovery of Property.**

Under this section, an administrator is empowered to sue for and recover the personal property of the estate. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

Under the direction of the court, a personal representative has the right to maintain a suit, whether its object is to recover real estate or the proceeds derived from the sale of real estate, where it has been ascertained that the real property was wrongfully obtained from the decedent. *Health Betterment Found. v. Thomas*, 225 Ark. 529, 283 S.W.2d 863 (1955).

### **Recovery of Rents.**

A widow in possession of the mansion of her late husband was entitled, in her own right, to collect the rents from the farm until dower was assigned her. *Mobley v. Andrews*, 55 Ark. 222, 17 S.W. 805 (1891) (decision under prior law).

An administrator was not entitled to recover rents on a building owned by his intestate where he neither alleged nor proved that the rents were needed to pay intestate's debts. *Campbell v. Smith*, 167 Ark. 633, 268 S.W. 359 (1925) (decision under prior law).

Where an administrator is not directed to take possession of realty under this section and the land is distributed to the

heirs, it is not error for the court to order him to pay delay rental money received after closing the estate into the registry of the court where a partition suit involving the land is pending, although such order is made after the estate is closed and as part of an order denying a motion to set aside an order disallowing a claim against the estate. *Boyd v. Matthews*, 239 Ark. 112, 388 S.W.2d 102 (1965).

### **Rights of Heirs.**

An heir at law would not acquire seizin of the lands of his ancestor so long as the lands remained in the possession of the administrator and there were outstanding debts. *Tate v. Jay*, 31 Ark. 576 (1876) (decision under prior law).

### **Sale of Property.**

A probate court's authority to order a sale does not encompass the power to order a partition, which is preferably accomplished by a division in kind, and an application for a sale must be made only for certain purposes and by the personal representative, not by the widow. *Gibson v. Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979).

Real estate vests in the heirs of a decedent, subject to the widow's dower and to sale for the payment of debts, the preservation or protection of the assets of the estate, the distribution of the estate, or any other purpose in the best interest of the estate; the sale, however, is not necessarily free of the widow's dower, and such a sale is not void for want of jurisdiction, but is simply inoperative as far as the widow's dower is concerned. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

### **Suits for Partition.**

Intestate's title to realty, irrespective of the extent of her interest, at the moment of her death, vested in her heirs, subject to the payment of her debts; and intestate's administrator, in whom title to the property never did vest, could not maintain suit for partition of land in which intestate held a fractional interest. *Calmese v. Weinstein*, 234 Ark. 237, 351 S.W.2d 437 (1961).

Where an administrator held real estate in her possession as an asset of the estate, collected rents, paid taxes, and kept the property insured, it was error for a chancery court to entertain jurisdiction



of a petition for partition filed by one of the heirs. *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).

#### **Unlawful Detainer.**

Where neither the allegation nor the proof established that possession of intestate's property or rents therefrom were needed to pay intestate's debts, the administrator had no right to maintain an action of unlawful detainer. *Lockhart v. Roberts*, 208 Ark. 569, 187 S.W.2d 183 (1945) (decision under prior law).

**Cited:** *Boyd v. Bradley*, 239 Ark. 120, 388 S.W.2d 107 (1965); *Brickey v. Lacy*, 247 Ark. 906, 448 S.W.2d 331 (1969); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975); *Brown v. Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990); *Graham v. State*, 34 Ark. App. 126, 806 S.W.2d 32 (1991); *Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997); *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

### **28-49-102. Treatment of certain property as real or personal.**

(a) Unless foreclosure has been completed by the decedent and the redemption period has expired prior to his or her death, real property mortgages, the interest in the mortgaged premises conveyed thereby, and the debt secured thereby which come into the hands of the personal representative, or any real property acquired by the personal representative in settlement of a debt or liability, shall be deemed personalty in his or her hands and be distributed and accounted for as such. However, if the property is sold by the personal representative, it shall be sold as real property.

(b) Except as provided in subsection (a) of this section, in all cases of a sale of real property by a personal representative upon order of the court, the surplus of the proceeds of the sale remaining at the time of final settlement of the account shall be considered as real property and disposed of among the persons and in the same proportions as the real property would have been if it had not been sold.

**History.** Acts 1949, No. 140, § 99; A.S.A. 1947, § 62-2406.

### **28-49-103. Discovery of assets.**

(a) If a personal representative or other person interested in the estate files with the court an affidavit stating that the affiant has good cause to believe that any person named in the affidavit has knowledge concerning or possession of any real or personal property or of any records, papers, or documents belonging to the decedent, or which affect his or her title to or rights in any property, the court shall have the power to cause the person to appear before the court and be examined on oath for the discovery of the same.

(b) Any person failing to appear when ordered or refusing to answer proper questions shall be adjudged guilty of contempt of court and punished accordingly.

**History.** Acts 1949, No. 140, § 102; A.S.A. 1947, § 62-2409.

## CASE NOTES

## ANALYSIS

Jurisdiction of Court.  
Res Judicata.

**Jurisdiction of Court.**

Although a probate court had no power to attach property in probate proceedings where the widow appeared in open court and stipulated that she had assigned notes to the estate and agreed to turn them over to the administrator, this action gave the probate court jurisdiction to order that the notes be turned over. *Hartman v. Hartman*, 228 Ark. 692, 309 S.W.2d 737 (1958).

In a proceeding by the executor of an estate against a niece to determine ownership of bank account, where both parties agreed to submit their differences to the probate court, that court could take and retain jurisdiction. *Park v. McClemens*, 231 Ark. 983, 334 S.W.2d 709 (Ark. 1960).

A probate court had jurisdiction to determine ownership of money in banks where the administrator voluntarily sub-

mitted to its jurisdiction and first objected on appeal; if the appellant had not wanted to submit the issue to the probate court, an objection should have been made before a full scale trial was had, and then the appellant could have raised the question on appeal. *Hobbs v. Collins*, 234 Ark. 779, 354 S.W.2d 551 (1962).

**Res Judicata.**

Where there were no minor children, an action by a deceased's widow as administrator to recover personal property belonging to the estate would bar a subsequent suit by the same plaintiff as the widow. *Raymond v. Raymond*, 134 Ark. 484, 204 S.W. 311 (1918) (decision under prior law).

**Cited:** *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955); *Snow v. Martensen*, 255 Ark. 1049, 505 S.W.2d 20 (1974); *Hall v. Superior Fed. Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990); *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

**28-49-104. Settlements.**

(a) When it appears to be for the best interest of the estate, or in the case of an action for wrongful death, for the best interest of the estate or widow and next of kin, the personal representative, upon the authorization of or approval by the court, may effect a compromise settlement of any claim, debt, or obligation due or owing to the estate, whether arising in contract or tort, or he or she may extend, renew, or in any manner modify the terms of any obligation owing to the estate.

(b) If the personal representative holds a mortgage, pledge, or other lien upon property of another person, he or she may, in lieu of foreclosure, accept a conveyance or transfer of the encumbered assets from the owner thereof in satisfaction of the indebtedness secured by the lien, if it appears for the best interest of the estate and if the court shall so order.

**History.** Acts 1949, No. 140, § 96; 1951, No. 255, § 8; A.S.A. 1947, § 62-2403.

**Cross References.** Compromise of claims against an estate, § 28-50-112.

## RESEARCH REFERENCES

**Ark. L. Rev.** Probate Code Amendments, 5 Ark. L. Rev. 377.

Panel on Settlement Procedures, 11 Ark. L. Rev. 54.



## CASE NOTES

## ANALYSIS

Authority of Court.  
Breach of Contract.  
Common Law Power.  
No Compromise.  
Provisions Inapplicable.  
Unliquidated Claims.

**Authority of Court.**

A personal representative has the authority to settle tort claims due an estate, and the probate court has authority to approve such settlements. *Skaggs v. Culphier*, 57 Ark. App. 50, 941 S.W.2d 443 (1997).

**Breach of Contract.**

A decedent's personal representatives could bring a breach of contract action against an attorney who allegedly failed to draft the decedent's will in accord with the decedent's desires. *McDonald v. Petrus*, 337 Ark. 265, 988 S.W.2d 9 (1999).

**Common Law Power.**

Acts 1848, § 1, p. 27, did not take away the common law power of an administrator to compromise a debt when a compromise was made pursuant to this section, as it relieved the administrator of the burden of proving that he acted judiciously. *Wilks v. Slaughter*, 49 Ark. 235, 4 S.W. 766 (1887); *Wunderlich v. Bowen*, 193 Ark. 284, 100 S.W.2d 80 (1936) (decisions under prior law).

**No Compromise.**

An agreement where the administrator of the seller of two mules permitted the buyer to keep the mules until fall and then to pay for them was not a compromise under former statute. *Lee v. Wagner*, 185 Ark. 374, 47 S.W.2d 33 (1932) (decision under prior law).

**Provisions Inapplicable.**

This section was held inapplicable to the petition of a widow, as administrator, alleging that the estate was insufficient to satisfy the dower and statutory rights of the widow or to pay the expenses of administration and claims in full and seeking full distribution of assets in exchange for her payment of all claims and expenses, and an order granting the petition would be set aside where the notice required by § 28-51-103, in relation to a petition for dower, was not given. *Wilson v. Davis*, 239 Ark. 305, 389 S.W.2d 442 (1965).

**Unliquidated Claims.**

An administrator could compromise and accept settlement of an unliquidated claim for damages without special authority from a probate court. *Treadway v. St. Louis, I.M. & S. Ry.*, 127 Ark. 211, 191 S.W. 930 (1917) (decision under prior law).

**Cited:** *Baker v. State Farm Fire & Cas. Co.*, 34 Ark. App. 59, 805 S.W.2d 665 (1991); *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997).

**28-49-105. Recovery for property embezzled or converted.**

If any person embezzles or converts to his or her own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to the estate for the value of the property so embezzled or converted. No person shall be charged as executor de son tort.

**History.** Acts 1949, No. 140, § 101; A.S.A. 1947, § 62-2408.

**28-49-106. Abandonment of property.**

When any property is valueless, or is so encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.

**History.** Acts 1949, No. 140, § 100;  
A.S.A. 1947, § 62-2407.

### CASE NOTES

#### **Equity Interest.**

Where there was evidence to indicate that an estate may have included equity in an automobile, since the decedent had purchased the property, the administrator should have proceeded to pay for it from the assets of the estate, sold it as provided in § 28-49-107, obtained authority to

abandon it as permitted under this section, or applied to the court for assignment of it to her as part of her statutory allowance under § 28-39-101, as she was accountable for it, either by accounting under the Probate Code or for conversion under § 28-49-105. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

#### **28-49-107. Property not paid for.**

(a) If a decedent has purchased any real or personal property and has neither completed the payments therefor, nor devised the property, nor provided by will for payment therefor, and the completion of the payments would be beneficial to the estate and not injurious to creditors, the personal representative, upon order of the court, may complete the payments out of assets in his or her hands, and the property shall be disposed of as other property of the estate.

(b) If the court finds that completion of the payments would not be beneficial to the estate or would be injurious to the creditors, the court may order the personal representative to sell all of the right, title, interest, and claim of the decedent in and to the property.

**History.** Acts 1949, No. 140, § 97;  
A.S.A. 1947, § 62-2404.

### CASE NOTES

#### ANALYSIS

Disposition Options.  
Inadequate Estate.  
Responsibility for Debt.  
Sale Without Order.

#### **Disposition Options.**

Where there was evidence to indicate that an estate may have included equity in an automobile, since the decedent had purchased the property, the administrator should have proceeded to pay for it from the assets of the estate, sold it as provided in this section, obtained authority to abandon it as permitted under § 28-49-106, or applied to the court for assignment of it to her as part of her statutory allowance under § 28-39-101, as she was accountable for it, either by accounting under the Probate Code or for conversion

under § 28-49-105. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

#### **Inadequate Estate.**

Where an estate was inadequate to complete payments on lands purchased by the decedent, the probate court could order the sale of the decedent's interest. *Smith v. Pinnell*, 107 Ark. 185, 154 S.W. 497 (1913) (decision under prior law).

#### **Responsibility for Debt.**

After a wife elected to take against her husband's will, a trial court did not err in ruling that the husband's estate was responsible for remaining debt owed to a creditor because the debt was mainly used for the construction of chicken houses and, therefore, the estate would receive the major benefit of the loan. *Combs v. Stewart*, 374 Ark. 409, 288 S.W.3d 574 (2008).



**Sale Without Order.**

A private sale made without authority from the court should not be confirmed.

Gibbs v. Singfield, 115 Ark. 385, 171 S.W. 144 (1914) (decision under prior law).

**28-49-108. Mortgaged property.**

(a) If a decedent has mortgaged any real or personal property, or has pledged any personal property, or at the time of his or her death owns an equity of redemption, and he or she has neither devised the property nor provided by will for the redemption thereof, the court may order the personal representative to redeem the property out of assets in his or her hands if the action would be beneficial to the estate and not injurious to creditors.

(b) If redemption would be injurious to the estate or to the creditors, the court may order the personal representative to sell all of the right, title, and interest of the decedent in and to the property.

**History.** Acts 1949, No. 140, § 98; A.S.A. 1947, § 62-2405.

**CASE NOTES****ANALYSIS**

Dower.  
Jurisdiction.

**Dower.**

Where a widow joined her husband in the execution of a mortgage of his land, she was entitled to dower therein, subject to the mortgage, but could not require the administrator to apply the personal estate to redeem the land. Hewitt v. Cox, 55 Ark.

225, 15 S.W. 1026 (1891) (decision under prior law).

**Jurisdiction.**

A petition requesting the right to sell homestead of a minor to pay the debts of an estate, such sale to be subject to a mortgage thereon, conferred no jurisdiction on the probate court under former statute. Bank of Mulberry v. Frazier, 178 Ark. 28, 9 S.W.2d 793 (1928) (decision under prior law).

**28-49-109. Fraudulent conveyances.**

(a) A personal representative of a grantor who has fraudulently conveyed or transferred any interest in real or personal property with intent to delay his or her creditors in the collection of their just demands may apply to a court of competent jurisdiction to have the conveyance or transfer set aside and cancelled and to recover the property, or the value thereof, for the use and benefit of all persons having an interest in the estate of the fraudulent grantor.

(b) No property so conveyed or transferred shall be taken from, nor shall any recovery be had from, any person who acquired any legal interest therein for a valuable consideration in good faith and without notice.

**History.** Acts 1949, No. 140, § 95; A.S.A. 1947, § 62-2402.

## RESEARCH REFERENCES

**Ark. L. Rev.** Fraudulent Conveyances in Arkansas, 19 Ark. L. Rev. 149.

## CASE NOTES

## ANALYSIS

Allegations in Complaint.  
Determinative Factors.  
Parties to Action.  
Personal Representative as Grantee.  
Validity of Deed.

**Allegations in Complaint.**

An administrator was not entitled to recover real property under this section where the complaint did not contain the allegation that defendants had obtained the property by fraud and undue influence upon the decedent. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

**Determinative Factors.**

The Supreme Court of Arkansas has recognized certain indicia of fraudulent intent, including insolvency or indebtedness of the transferor, inadequate or fictitious consideration, retention of property by the debtor, the pendency or threat of litigation, secrecy or concealment, and the employment of unusual business practices; transfers to a debtor's family members are particularly suspect. *United States v. Bryant*, 15 F.3d 756 (8th Cir. 1994).

A couple's conveyance of substantially all their real and personal property to their children in trust, for nominal consideration, when litigation over substantial tax deficiencies and penalties was pending, exhibited all or virtually all of the indicia of fraud recognized in Arkansas; the claim by the father that he had a heart attack in 1985 and the conveyance was motivated by bona fide estate planning consideration was inadequate to avoid summary judgment in favor of the government under the well established principles of Arkansas fraudulent conveyance law. *United States v. Bryant*, 15 F.3d 756 (8th Cir. 1994).

Administratrix, wife of the decedent, who sought to divorce the decedent but reconciled shortly before the decedent's death, convinced the trial court the monies in a transfer-on-death account (TOD

account), naming children from the decedent's former marriage as the beneficiaries, was a fraudulent transfer; if the TOD account was owned by both the decedent and the administratrix, the administratrix could claim dower rights in the property, but decedent's children presented compelling facts that the account was separate property owned by the decedent, and the trial court erred in granting summary judgment in favor of the administratrix. *Ginsburg v. Ginsburg*, 353 Ark. 816, 120 S.W.3d 567 (2003).

**Parties to Action.**

Where the administrator of an estate would not bring suit to set aside a fraudulent conveyance, it was proper for the widow to bring it and join the administrator as a defendant. *Rush v. Smith*, 239 Ark. 874, 394 S.W.2d 613 (1965).

**Personal Representative as Grantee.**

Where an administrator was the fraudulent grantee of the decedent, her husband, she held the property in trust for the heirs at law, and the limitations did not begin to run against a suit by them for its recovery until she repudiated the trust. *Bumpass v. McGehee*, 247 F.306 (8th Cir. 1917) (decision under prior law).

Where the executor of an alleged fraudulent grantor was the grantee and refused to bring a suit to set the deed aside, the heirs at law of the grantor had the right to bring it, making the executor a defendant. *Moore v. Waldstein*, 74 Ark. 273, 85 S.W. 416 (1905) (decision under prior law).

**Validity of Deed.**

Although a deceased executed a deed with the intent to defraud his creditors, the deed did not take effect until delivery and when it was not delivered until a subsequent time, when there were no creditors of the deceased who could suffer by the transfer, the deed was not void. *Deniston v. Phillips*, 121 Ark. 550, 181 S.W. 911 (1916) (decision under prior law).

**Cited:** *Dereuisseaux v. Bell*, 238 Ark. 60, 378 S.W.2d 208 (1964).



**28-49-110. Inventories.**

(a)(1) Except as provided in this section, within two (2) months after his or her qualification or as the court may direct, a personal representative shall file a true and complete inventory of all property owned by the decedent at the time of his or her death, except such interests as terminated by reason of his or her death, describing each item of property in detail and setting out the personal representative's appraisal of the fair market value of the property as of the date of the death of the decedent.

(2) The personal representative shall append to the inventory his or her affidavit to the effect that the inventory is complete and accurate to the best of his or her knowledge and belief and that the personal representative was not indebted or obligated to the deceased at the time of his or her death except as stated in the inventory.

(b) Errors or omissions in an inventory shall be corrected by supplemental inventory or the next accounting of the personal representative or as the court may direct.

(c)(1) The filing of inventory shall not be required if all of the distributees who are competent and the legally appointed, qualified, and acting guardians of the estates of all those incompetent have filed written waiver of inventory, unless the court finds a need for filing the inventory.

(2) However, if any person asserts a claim against the estate or claims an interest therein and makes written demand for the filing of an inventory, it shall be filed unless it is shown to the court that the alleged claim is invalid or has been paid or that the person alleging such an interest in the estate has, in fact, no interest therein.

(d) Inventories may be introduced in evidence but shall not be conclusive for or against the personal representative or any person interested in the estate. Other evidence may be admitted to vary the effect thereof.

**History.** Acts 1949, No. 140, §§ 91, 92; 1973, No. 39, § 1; A.S.A. 1947, §§ 62-2301, 62-2302.

**CASE NOTES****ANALYSIS**

Bond and Accounting.  
Filing Requirements.  
Jurisdiction.  
Res Judicata.

**Bond and Accounting.**

Where a will provided for the appointment of a widow as the executor without giving bond and without making reports and settlements, a remainderman in the estate had no right to require a bond and

an accounting from the widow, who was a life tenant, without alleging and proving mismanagement, waste, or conversion. *Dillen v. Fancher*, 197 Ark. 995, 125 S.W.2d 110 (1939) (decision under prior law).

**Filing Requirements.**

Since this section requires the filing of an inventory in a prescribed form and §§ 28-52-103 and 28-52-104 also set out requirements as to form and time of accounting, the fact that an administrator

filed a "first and final report" purporting to furnish full information with respect to everything pertaining to the estate was not compliance in the manner and form required by these sections. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

An inventory was inadequate where the personal representative failed to attach an affidavit as required by subsection (a). *Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 35 S.W.3d 315 (2000).

### **Jurisdiction.**

A probate court has jurisdiction to direct the executor of an estate to collect and distribute the proceeds from a rental note if the granting of a petition would be for the best interest of the estate and the devisees. *Pigue v. Grooms*, 248 Ark. 262, 451 S.W.2d 181 (1970).

A probate court erred in refusing to take jurisdiction of an executor's petition asking that he be directed to collect rent note

for land which the testator had left to five separate devisees where the devisees were scattered geographically, the tenant would naturally demand the surrender of the note when he paid it, and devisees were unable to agree upon the distribution of the proceeds. *Pigue v. Grooms*, 248 Ark. 262, 451 S.W.2d 181 (1970).

### **Res Judicata.**

Where the heirs did not perfect an appeal from a judgment of a circuit court reversing a judgment of a probate court requiring an executor to make an inventory and file accounts in a proceeding instituted by them, they could not relitigate the same question in a subsequent proceeding instituted by the probate clerk by which the heirs became parties on their own motion. *Parker v. Williams*, 172 Ark. 699, 290 S.W. 67 (1927) (decision under prior law).

## **28-49-111. Debt of executor.**

Nomination in a will of any person as executor shall not operate as a discharge or bequest of any right of action which the testator had against the executor, but the right of action, if it survives, shall be included in the inventory among the assets of the decedent.

**History.** Acts 1949, No. 140, § 93; A.S.A. 1947, § 62-2303.

## **CASE NOTES**

### **ANALYSIS**

Operation in General.  
Parol Evidence.  
Transferable Title.

### **Operation in General.**

Where a testator devised land to debtor and appointed him executor, the value of the land conveyed by debtor, which could not be impressed with lien to the extent of indebtedness, had to be treated as cash once in hand but converted, and undisposed lands were assets in the hands of the executor, subject to satisfaction of charges against the estate. *Blocker v. Scherer*, 206 Ark. 28, 174 S.W.2d 371 (1943) (decision under prior law).

### **Parol Evidence.**

On the issue whether or not a legacy or devise was intended to forgive a debt from the legatee or devisee, parol evidence was held admissible. *Blocker v. Scherer*, 206 Ark. 28, 174 S.W.2d 371 (1943) (decision under prior law).

### **Transferable Title.**

Where a will devising land to debtor and appointing him executor was made after the debt was contracted and contained no directive requiring payment of the obligation before benefits of the devise could vest, the debtor took a title he could transfer until legally restrained from doing so. *Blocker v. Scherer*, 206 Ark. 28, 174 S.W.2d 371 (1943) (decision under prior law).



**28-49-112. Continuation of business.**

(a)(1) Unless a testator shall otherwise direct by his or her last will and testament, a personal representative shall have authority to continue any business in which the decedent may have been engaged at the time of death for a period not exceeding one (1) month following the date of the granting of letters of administration without obtaining an order of the court, and, if the business is that of conducting farming operations, he or she may so continue the farming operations for a period of three (3) months or until the end of the calendar year in which the death of the decedent occurred, whichever shall be the longer.

(2) Thereafter, upon petition of the personal representative, the court may order the further continuance of the operation of the business, if not a farming operation, by the personal representative for an additional period not to exceed three (3) months, and for an additional period not to exceed one (1) year if it is a farming operation.

(3) The petition shall set forth the reasons why the petitioner believes the business should be further continued and a brief financial statement of the operation of the business by the petitioner.

(4) The court may from time to time further continue the period during which the business may be so operated. However, no one (1) continuance shall be for a period exceeding three (3) months if a non-farming operation or one (1) year for a farming operation.

(5) The personal representative shall not have the authority to bind the estate beyond the last period during which the business was authorized to be continued.

(b) The estate, but not the personal representative personally, shall be liable for damages resulting from torts or other acts committed by agents and employees of the estate in the course of their employment.

(c) It is specifically recognized that the operation of any business undertaking involves hazard, chance, and danger of loss. In recognition of this fact, it is declared to be the legislative intent that no personal representative shall be held personally liable for loss resulting from mere lack of familiarity with the business operations, mistake of judgment made in good faith, or like causes.

**History.** Acts 1949, No. 140, § 103; 1985, No. 1007, § 4; A.S.A. 1947, § 62-2410.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Haught, 1988 Update to view of Recent Developments in Arkansas the Arkansas Probate System: An Over- Probate Practice, 42 Ark. L. Rev. 631.

**CASE NOTES****Trade Creditors.**

Where business was continued by an administrator or executor, trade creditors could not resort to the general assets of

the estate for the purpose of reimbursement or payment; rather, their remedies were confined to the assets embarked in the trade or business. State ex rel. Al-

theimer v. Hunter, 56 Ark. 159, 19 S.W. 857, 520 S.W.2d 286 (1975); Price v. Price, 496 (1892) (decision under prior law). 258 Ark. 363, 527 S.W.2d 322 (1975).

**Cited:** In re Estate of Spann, 257 Ark.

### 28-49-113. Power to borrow money.

Upon a showing that such an action will be advantageous to the estate, the court may authorize the personal representative to borrow money, to execute notes and other legal evidences of indebtedness, and to mortgage property of the estate in accordance with the provisions of §§ 28-51-201 and 28-51-301.

**History.** Acts 1949, No. 140, § 104; A.S.A. 1947, § 62-2411.

### CASE NOTES

#### **Borrowing When No Lien.**

A mortgage executed by the administrator of an estate when no debt secured by a lien existed at the time of the death of the

intestate was void. Reed v. Futrall, 195 Ark. 1044, 115 S.W.2d 542 (1938); Acker v. Watkins, 199 Ark. 573, 134 S.W.2d 523 (1939) (decisions under prior law).

### 28-49-114. Performance of decedent's contracts of sale.

(a) When a decedent shall have entered into a contract for the conveyance of real property or sale of specific personal property which was not performed during his or her lifetime, the court, upon petition of the personal representative, the purchaser, or other interested person, if it finds that the decedent, if he or she had lived, could have been required to make the conveyance or consummate the sale, shall direct the personal representative to execute the deed of conveyance or the bill of sale pursuant to the terms of the original contract. The conveyance or bill of sale shall have the same effect to pass the title or interest of the decedent as if made by him or her personally.

(b)(1) If the contract requires the giving of warranties, the deed or bill of sale to be given by the personal representative shall contain the warranties required.

(2) The warranties shall be binding on the estate as though made by the decedent but shall not bind the personal representative personally.

(c) A certified copy of the order authorizing the execution of the instrument may be recorded with the deed or bill of sale in the office of the recorder for the county where the property is situated and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings, and the authority of the personal representative to make the conveyance.

**History.** Acts 1949, No. 140, § 105; A.S.A. 1947, § 62-2412.



## CASE NOTES

## ANALYSIS

Conveyance of Land.  
New Liability.

**Conveyance of Land.**

To convey land there had to be a valid executory contract made by the decedent before a probate court could order specific performance, and jurisdiction would not be presumed. *Oliver v. Routh*, 123 Ark. 189, 184 S.W. 843 (1916) (decision under prior law).

In a suit by mortgagor against the administrator of mortgagee to compel conveyance of certain lands which mortgagee had purchased at trustee's sale, evidence of agreement that mortgagor should have an extension of time to pay the mortgage

debt or should have the right to redeem or repurchase, and contract was made before expiration of time within which redemption might have been effected from trustee's sale, warranted a decree for the plaintiff. *Wood v. Conner*, 205 Ark. 582, 170 S.W.2d 997 (1943) (decision under prior law).

**New Liability.**

An executor could not create a new liability where none existed before by binding an estate upon an unaccepted subscription which was ineffectual because it had not been accepted during the subscriber's lifetime. *Blanton v. Forrest City Mfg. Co.*, 138 Ark. 508, 212 S.W. 330 (1919) (decision under prior law).

**28-49-115. Investment of funds.**

Subject to his or her primary duty to preserve the estate for prompt distribution and to the terms of the will, if any, the personal representative, whenever it is reasonable to do so, shall invest the funds of the estate and make them productive. The investments shall be restricted to those permitted to guardians by the Probate Code.

**History.** Acts 1949, No. 140, § 106; A.S.A. 1947, § 62-2413.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

## CASE NOTES

## ANALYSIS

Arbitrary Charge.  
Interest Not Chargeable.  
Money Ready for Distribution.

**Arbitrary Charge.**

It was error to direct an arbitrary charge of the highest legal rate without first making investigation as to whether the charge was just and reasonable. *Howard v. Manning*, 65 Ark. 122, 44 S.W. 1126 (1898) (decision under prior law).

**Interest Not Chargeable.**

An administrator who, with the court's authority, converted a minor's estate into

cash and deposited the money to his credit as administrator and made no personal use thereof was not chargeable with interest. *Alcorn v. Alcorn*, 183 Ark. 342, 35 S.W.2d 1027 (1931) (decision under prior law).

**Money Ready for Distribution.**

No authority was conferred to order an administrator to lend money ready for distribution, and the lending of such money was an illegal expenditure. *Boyd v. Duncan*, 178 Ark. 772, 12 S.W.2d 395 (1929) (decision under prior law).

**28-49-116. Bank deposits.**

A personal representative may, and when ordered by the court shall, deposit, as a fiduciary, the funds of the estate in a bank or banks of this state, as a general deposit, either in a checking account or a savings account.

**History.** Acts 1949, No. 140, § 107;  
A.S.A. 1947, § 62-2414.

**CASE NOTES**

**Out-of-State Banks.**

This section neither specifically authorizes nor prohibits an executor from de-

positing the funds of an estate in an out-of-state bank. *Graham v. State*, 34 Ark. App. 126, 806 S.W.2d 32 (1991).

**28-49-117. Authority to execute joint tax returns.**

(a) Except as otherwise directed by the decedent in his or her will, upon petition of a personal representative or guardian of the estate of an incompetent person, the personal representative or guardian shall have the authority, when authorized by the court:

(1) To join with the spouse of a decedent or of a ward in the making of a joint income tax return for the decedent or ward and his or her spouse;

(2) To require such indemnity, if any, as the court may direct;

(3) To consent, for gift tax purposes, to gifts made by the spouse of a decedent or ward to the end that gifts to which consent is given shall be treated for gift tax purposes as if made one-half (½) by the decedent, or ward, and one-half (½) by his or her spouse;

(4) To enter into a contract with the spouse of a decedent or ward in respect to any joint income tax return or any such consent, or in respect to any matter arising therefrom.

(b) An order authorizing the personal representative or guardian to take any action authorized by this section shall be entered only upon a hearing, held after notice given to such persons as the court may direct. Any liability incurred by the fiduciary pursuant to any such order shall be incurred on behalf of the estate of the decedent or ward.

**History.** Acts 1949, No. 140, § 105.1, as added by Acts 1951, No. 255, § 9; A.S.A. 1947, § 62-2412.1.

**CHAPTER 50**

**CLAIMS AGAINST ESTATES**

**SECTION.**

28-50-101. Limitations on filing of claims.

28-50-102. Commencement or revival of actions.

28-50-103. Form and verification of claims.

**SECTION.**

28-50-104. Presentation and filing of claims.

28-50-105. Allowance of claims.

28-50-106. Classification and payment of claims.



## SECTION.

28-50-107. Claims of personal representative.

28-50-108. Claims not due.

28-50-109. Secured claims.

28-50-110. Contingent claims.

28-50-111. Payment of contingent claims

## SECTION.

by distributees — Contribution.

28-50-112. Compromise of claims.

28-50-113. Payment of claims.

28-50-114. Execution and levies prohibited.

**Effective Dates.** Acts 1971, No. 385, § 3: effective July 1, 1971 and applicable to all tort actions arising thereafter as well as to all tort actions previously accrued which were not barred by the six-month nonclaim statute on July 1, 1971.

Acts 1989 (3rd Ex. Sess.), No. 59, § 5: Nov. 16, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain language appearing in Act 939 of the Sev-

enty-Seventh General Assembly, was included in the act in error, thus resulting in ambiguity and uncertainty as to the meaning and effect of its provisions, and this act deletes the erroneous language of Act 929. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

### RESEARCH REFERENCES

**ALR.** Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon. 17 A.L.R.4th 530.

Rejection of claim against estate to commence running of statute of limitations applicable to rejected claims. 36 A.L.R.4th 684.

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 268 et seq.

**Ark. L. Rev.** Acts 1949 General Assem-

bly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

**Wills** — Effect of the Nonclaim Statute on a Cause of Action, 10 Ark. L. Rev. 237.

Panel on Settlement Procedures, 11 Ark. L. Rev. 54.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 394 et seq.

**U. Ark. Little Rock L.J.** Survey of Arkansas Law, Decedents' Estates, 1 U. Ark. Little Rock L.J. 185.

### 28-50-101. Limitations on filing of claims.

#### (a) STATUTE OF NONCLAIM.

(1) Except as provided in §§ 28-50-102 and 28-50-110, all claims against a decedent's estate, other than expenses of administration and claims of the United States which, under valid laws of the United States, are not barrable by a statute of nonclaim, but including claims of a state or territory of the United States and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred as against the estate, the personal representative, or the heirs and devisees of the decedent, unless verified to the personal representative or filed with the court within six (6) months after the date of the first publication of notice to creditors.

(2) All claims for injury or death caused by the negligence of the decedent shall also be filed within six (6) months from the date of first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate.

(b) **STATUTE OF LIMITATIONS.** No claim shall be allowed which was barred by any statute of limitations at the time of the decedent's death.

(c) **WHEN STATUTE OF NONCLAIM NOT AFFECTED BY STATUTE OF LIMITATIONS.** No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be presented to the personal representative or filed with the court within six (6) months after the date of the first publication of notice to creditors.

(d) **CLAIMS BARRED WHEN NO ADMINISTRATION COMMENCED OR NO NOTICE PUBLISHED.** In any event, all claims barrable under the provision of subsection (a) of this section shall be barred at the end of five (5) years after the date of the death of the decedent, unless within this period letters have been issued and notice to creditors published as provided by § 28-40-111.

(e) **LIENS NOT AFFECTED.** Nothing in this section shall affect or prevent any action or proceeding to enforce any mortgage, pledge, or other lien arising under contract or statute upon the property of the estate.

(f) **CERTAIN TORT CLAIMS NOT AFFECTED.**

(1) Notwithstanding the foregoing provisions relating to the time for filing claims against an estate, or any other provisions of the Probate Code, a tort claim or tort action against the estate of a deceased tortfeasor, to the extent of any recovery which will be satisfied from liability insurance or from uninsured motorist insurance coverage and which will not use, consume, or deplete any assets of the decedent's estate, may be brought within the limitation period otherwise provided for the tort action.

(2) No recovery against the tortfeasor's estate shall use, consume, diminish, or deplete the assets of the decedent's estate, and any recovery shall not affect the distribution of the assets of the estate to the heirs, next of kin, legatees, or devisees of the deceased tortfeasor unless a claim is filed in the manner and within the time provided by the Probate Code for filing claims against the estate.

(g) **EXTENSION OF LIMITATION TO CERTAIN CASES.** Notwithstanding the foregoing provisions relating to the time for filing claims against an estate, or any other provisions of the Probate Code, a creditor of an estate who receives service of notice from the personal representative in accordance with § 28-40-111(a)(4), within thirty (30) days of the expiration of the nonclaim period, shall have an additional thirty (30) days after the expiration of the nonclaim period in which to present or file its claim.

(h) **CLAIMS OF KNOWN OR REASONABLY ASCERTAINABLE CREDITORS BARRED.** Notwithstanding any other provisions of this section to the contrary, the claims of all known or reasonably ascertainable creditors shall be barred at the end of two (2) years from date of first publication of notice



to creditors, even if they have not been provided actual notice in accordance with § 28-40-111(a)(4).

**History.** Acts 1949, No. 140, § 110; 1971, No. 385, § 1; 1985, No. 1007, § 3; A.S.A. 1947, § 62-2601; Acts 1989, No. 929, § 2; 1989 (3rd Ex. Sess.), No. 59, § 2; 2007, No. 231, § 1; 2009, No. 217, § 2.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

**Amendments.** The 2007 amendment substituted "six (6) months" for "three (3)

months" in (a)(1); and in (a)(2), substituted "All" for "However" at the beginning, inserted "also" after the first occurrence of "shall" and made a minor punctuation change.

The 2009 amendment substituted "six (6)" for "three (3)" in (c).

**Cross References.** Publication of notice, § 16-3-101 et seq.

## RESEARCH REFERENCES

**Ark. L. Rev.** Haight, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

Note, The Requirement of Notice in Probate Proceedings: Recent Changes in Arkansas Law, 43 Ark. L. Rev. 945.

## CASE NOTES

### ANALYSIS

Constitutionality.  
Construction.  
Purpose.  
Applicability.  
—Claims.  
—Guardianships.  
—Infants.  
—Nonresidents.  
—State Claims.  
Amendment of Claims.  
Bank Stock Assessments.  
Claims Barred.  
Claims Timely Filed.  
Contingent Claims.  
Cosureties.  
Exhibition of Claims.  
Federal Question Rule.  
Final and Appealable Order.  
Judgments.  
—Ancillary Administration.  
—No Notice.  
Notice of Filing Claims.  
Preservation for Review.  
Promissory Notes.  
Reasonable Notice.  
Right to Intervene.  
Statute of Nonclaim.  
—Applicability.  
—Claims Barred.  
—Claims Not Barred.  
—Commencement.

—Federal Actions.  
—Mortgages.  
—Personal Injuries.  
—Revival of Claims.  
—Rule of Limitations.  
—Tolled.  
—Waiver.  
Time for Filing.  
Tort Claims.  
Wrongful Ouster.

### Constitutionality.

Subsection (f) of this section is constitutional. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

### Construction.

A creditor of an estate must be subject to identification during the three month statute of nonclaim under subsection (a) of this section; if this were not the case, then all matters of estate would be left open for two years under § 28-40-111(a) and subsection (h) of this section, which was certainly not the intent of the legislature. *Brasel v. Estate of Harp*, 317 Ark. 379, 877 S.W.2d 923 (1994).

Subsection (f) of this section does not repeal by implication either § 28-53-119 or § 28-50-102. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

If the defendant is deceased, the three-year limit on wrongful death actions provided by § 16-62-102(c)(1) may be short-

ened by subsection (a) of this section. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

#### **Purpose.**

Under former similar statute, it was intended that an administration should be closed and final settlement made after one year if there were no outstanding debts or claims against the estate. *State Nat'l Bank v. Fisher*, 186 Ark. 42, 52 S.W.2d 51 (1932) (decision under prior law).

The legislative intention of this section is to require assertion of all claims against a decedent's estate, including those sounding in tort, within the period prescribed. *Wolfe v. Herndon*, 234 Ark. 543, 353 S.W.2d 540 (1962).

The purpose of this section's requirements in filing of claims against estates is to effect and facilitate the payment of just claims against the estate within the specified time and not to defeat a just claim on a technicality that might entrap the claimant. *Jones v. Arkansas Farmers Ass'n*, 232 Ark. 186, 334 S.W.2d 887 (1960); *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972); *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

Two purposes of subsection (f) of this section are to provide certainty and closure to estate administration, and to prevent the elimination of depletion of estate assets by claims not filed timely; and also to provide redress for personal injury victims. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

#### **Applicability.**

Time limitations in subsection (a) of this section do not apply to claims by illegitimate children under § 28-9-209(d); therefore, the trial court did not err by finding that an illegitimate son was a pretermitted heir. *Taylor v. Hamilton*, 90 Ark. App. 235, 205 S.W.3d 149 (2005).

#### **—Claims.**

This section does not refer to claims of title or for the recovery of property, for the reason that claims of such a character cannot, in any sense, be said to be claims against the estate of the deceased. *Morton v. Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965); *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

A compensation carrier is not required to file a claim against the estate of an

employee killed in an auto accident arising out of, and in the course of, his employment in order to enforce its subrogation rights against the sum paid under the uninsured motorist provision of the deceased employee's automobile insurance policy. *Boehler v. Insurance Co. of N. Am.*, 290 F. Supp. 867 (E.D. Ark. 1968). But see *Heiss v. Aetna Casualty & Surety Co.*, 250 Ark. 474, 465 S.W.2d 699 (1971).

A claim against an estate for attorney's fees awarded against the personal representative in an action commenced by the personal representative was an administrative claim and, therefore, was not subject to the statute of nonclaim. *Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 35 S.W.3d 315 (2000).

#### **—Guardianships.**

The claim of a ward against the estate of a deceased guardian had to be presented to his administrator within the time prescribed after the grant of letters of administration, whether there has been a final settlement of the guardianship or not. *Connelly v. Weatherford*, 33 Ark. 658 (1878) (decision under prior law).

#### **—Infants.**

Infants have been held not excepted from the statute of nonclaim. *Padgett v. State*, 45 Ark. 495 (1885) (decision under prior law).

In an action by an executor for damages sustained by the decedent in an automobile accident between decedent and defendant where defendant filed a cross-complaint for damages against estate, the fact that the guardian ad litem of the defendant was not appointed in strict compliance with the applicable statute was of no consequence since there is no savings clause in favor of infants in the statute of nonclaim; therefore, it was incumbent upon defendant to present his claim in compliance with this section by filing a copy of the cross-complaint with the probate court. *Wolfe v. Herndon*, 234 Ark. 543, 353 S.W.2d 540 (1962).

#### **—Nonresidents.**

Former similar statute applied to and ran against nonresidents as well as resident claimants. *Erwin v. Turner*, 6 Ark. (1 English) 14 (1845) (decision under prior law).

#### **—State Claims.**

The statute of nonclaim was held a bar to the claims of the state if not presented



within the time prescribed as in the case of individuals. *Hill v. State*, 23 Ark. (10 Barber) 604 (1861) (decision under prior law).

### **Amendment of Claims.**

Where the original claim against an estate was filed within the statutory period, an amendment filed after the expiration of the time allowed for the filing of claims was not a new cause of action but merely a clarification of the original claim which contained allegations upon which the amended claim was predicated; therefore, it related back to the original filing of the claim. *Gober v. Baker*, 239 Ark. 692, 393 S.W.2d 620 (1965).

### **Bank Stock Assessments.**

A claim by the state bank commissioner against the executor of a deceased stockholder to recover the assessment on bank stock was not to be dismissed for failure to comply with former similar statute. *Berlin v. Rainwater*, 174 Ark. 66, 294 S.W. 368 (1927) (decision under prior law).

### **Claims Barred.**

A claim presented more than 15 years after decedent's death and first publication of notice to creditors was barred under subsections (a) and (b) of this section. *Brooks v. Baker*, 242 Ark. 128, 412 S.W.2d 271 (1967).

An action to recover for injuries sustained in an automobile collision involving a vehicle driven by the decedent was barred under this section where it was not instituted until more than six months after the administratrix' first notice to creditors was published. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970) (decision under prior law).

### **Claims Timely Filed.**

Where a claim against an estate reached a county clerk and, though not filed separately, was placed in the case file of deceased's estate within the statutory period for filing, the claim was deemed timely filed under this section. *Edwards v. Brimm*, 236 Ark. 588, 367 S.W.2d 433 (1963).

### **Contingent Claims.**

A contingent claim filed under § 28-50-110 which does not become absolute until a ruling by a court is made and is then filed within six months after becoming

absolute is not barred because it was not filed within the time required by this section. *Whitener v. Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957).

A contingent claim against an estate, which becomes absolute six months prior to the final order of distribution, must be filed within six months after becoming absolute or it is unenforceable. *Huff v. Bruce*, 261 Ark. 498, 549 S.W.2d 282 (1977).

### **Cosureties.**

In a suit on the bond of an insurance agent, the failure to proceed against the estate of one surety prior to the bar of former similar statute did not release co-surety where the statutory bar attached prior to the accrual of a cause of action. *Oliver v. Franklin Fire Ins. Co.*, 195 Ark. 840, 114 S.W.2d 1071 (1938) (decision under prior law).

### **Exhibition of Claims.**

All demands existing at the time of the death of a testator or intestate, whether matured or not, capable of being asserted in a court of justice, whether of law or equity, had to be exhibited within the period prescribed as did also all claims coming into existence at any time after the death of the testator or intestate, and before the expiration of this period. *Bennett v. Dawson*, 18 Ark. (5 Barber) 334 (1857); *Stewart v. Thomasson*, 94 Ark. 60, 126 S.W. 86 (1910) (preceding decisions under prior law).

### **Federal Question Rule.**

A defendant was not entitled to dismissal of an action based on federal rights where the plaintiff complied with the federal rule of substitution of parties rather than this conflicting statute relating to the assertion of claims against estates. *Downie v. Pritchard*, 309 F.2d 634 (8th Cir. 1962).

Where an executor chose a federal forum to litigate all claims against an estate under rights conferred by 46 U.S.C. §§ 182-189, and matters of procedure under the federal statutes were in conflict with provisions of this section and § 28-50-104, the federal statutes governed. *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972).

Where an executor chose a federal forum to litigate all claims against an estate under 46 U.S.C. Appx. §§ 182-189, and

federal district court issued an injunction barring all actions, suits, and proceedings against the estate other than those filed with the federal district court clerk, the failure by claimants against estate to comply with this section by presenting claims to personal representative of the estate was not ground for dismissal of the claims, since, under § 28-50-104, claims presented to the personal representative must thereafter be filed with the court and such a proceeding was expressly forbidden by the federal district court's injunction. *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972).

### **Final and Appealable Order.**

An order disallowing a claim for failure to file within the time and manner required by this section is a final and appealable order and cannot be attacked on appeal of a denial of a motion to set aside the order where there is no showing of error in the order denying the motion. *Boyd v. Matthews*, 239 Ark. 112, 388 S.W.2d 102 (1965).

### **Judgments.**

A delay of 13 years barred the enforcement of a judgment. *Johnson v. Peck*, 58 Ark. 580, 25 S.W. 865 (1894) (decision under prior law).

It was not necessary for the validity of a judgment against the estate of a deceased administrator that it be presented to his executors or referred to a probate court. *McLain v. Sprigg*, 174 Ark. 1052, 298 S.W. 870 (1927) (decision under prior law).

### **—Ancillary Administration.**

A judgment against an ancillary administrator in another state was not binding on the original administrator in this state; nor could the judgment-creditor pursue the assets of the estate here which had descended to heirs or distributees after the expiration of the time for presentation of claims. *Turner v. Risor*, 54 Ark. 33, 15 S.W. 13 (1890) (decision under prior law).

### **—No Notice.**

Where judgment of allowance of a claim was rendered without notice to the executor, it was subject to attack for unavoidable casualty preventing the executor from appearing and making her defense. *Withers v. Merritt*, 212 Ark. 91, 204 S.W.2d 881 (1947) (decision under prior law).

### **Notice of Filing Claims.**

Statutory notice of the filing of a claim against an estate was not waived because of the lack of diligence of the counsel for the executor in complying with a court order to file an inventory. *Withers v. Merritt*, 212 Ark. 91, 204 S.W.2d 881 (1947) (decision under prior law).

The fact that an executor had knowledge of the existence of a claim against the estate did not waive the statutory provisions concerning notice of filing the claim. *Withers v. Merritt*, 212 Ark. 91, 204 S.W.2d 881 (1947) (decision under prior law).

### **Preservation for Review.**

Argument that a wife's declaratory judgment action in a probate case was time barred under this section was not heard on appellate review because the issue was not raised before the trial court. *Cloud v. Brandt*, 370 Ark. 323, 259 S.W.3d 439 (2007).

### **Promissory Notes.**

A promissory note that stipulates that it was to be "paid at once after my funeral expenses and debts are paid" was not void and was not in conflict with former similar statute. *Simon v. Pine Bluff Trust Co.*, 99 Ark. 523, 138 S.W. 986 (1911) (decision under prior law).

### **Reasonable Notice.**

Where a passenger injured in an airplane crash filed a negligence suit against the estate of the deceased pilot, the insurer of the airplane was entitled to notice of, and had the right to intervene in, the proceedings; the method of giving notice had to be reasonably calculated to apprise the insurance company of the pendency of the action, and the attempted notice by a letter mailed to the wrong address was insufficient. *Ideal Mut. Ins. Co. v. McMillian*, 275 Ark. 418, 631 S.W.2d 274 (1982).

### **Right to Intervene.**

Under the provisions of subsection (f) of this section, an insurance company which insures a deceased tortfeasor is the only party financially interested in the outcome of the case, since, although the estate is the named defendant, it is not financially liable under the statute; therefore, the peculiar nature of the statute, in effect, confers an unconditional right to intervene on the insurance carrier under



ARCP 24(a), and the insurance carrier is entitled to notice of the proceedings. *Ideal Mut. Ins. Co. v. McMillian*, 275 Ark. 418, 631 S.W.2d 274 (1982).

### **Statute of Nonclaim.**

Circuit court erred when it held that a father's claim was barred by the statute of nonclaim, subsections (a) and (f) of this section; because the father was a known or reasonably ascertainable creditor within the nonclaim period and did not receive actual notice of the nonclaim deadline, subsection (h) of this section extended the nonclaim period for two years. *Massey v. Fulks*, 2011 Ark. 4, — S.W.3d — (2011).

### **—Applicability.**

Where an action on note was commenced in January 1937, and an administrator was appointed in December 1936, and the administrator's answer admitted that note, duly verified by both the assignor and assignee, had been presented to him and his attorney admitted in open court at the trial that this had been done before commencement of the suit, the court was warranted in finding that the statute of nonclaim did not apply. *Potts v. Brotherton*, 197 Ark. 556, 124 S.W.2d 5 (1939) (decision under prior law).

The statute of nonclaim did not apply where a deceased before her death failed to terminate a year-to-year tenancy relationship with appellee by giving the required notice, where the appellee was ousted from the leased premises by the administrator of the decedent's estate prior to the end of the term, and where the appellee obtained a judgment against the estate for wrongful ouster, which arose as a cost of administration of the estate. *Brickey v. Lacy*, 247 Ark. 906, 448 S.W.2d 331 (1969).

### **—Claims Barred.**

Where a bank by mistake permitted a customer to overdraw his account and the overdraft was not discovered until after the statutory period of nonclaim ran against the customer's estate, the claim was barred. *Lawrence County Bank v. Arendt*, 80 Ark. 523, 98 S.W. 356 (1906) (decision under prior law).

### **—Claims Not Barred.**

A secured creditor retains the right to enforce a lien against real or personal

property pledged as collateral, notwithstanding the creditor's failure to file a probable claim against the debtor's estate within the nonclaim limitations period. *United States v. Dawson*, 929 F.2d 1336 (8th Cir. 1991), rehearing denied, — F.2d —, 1991 U.S. App. LEXIS 6001 (8th Cir. Apr. 11, 1991).

### **—Commencement.**

The statute of nonclaim began to run on a demand against the estate of a deceased person from the grant of letters of administration thereon. *Ross v. Frick Co.*, 73 Ark. 45, 83 S.W. 343 (1904) (decision under prior law).

### **—Federal Actions.**

A minor and his mother could maintain tort actions against the estate of a decedent after the expiration of the statute of nonclaim when there was in force a policy of liability insurance on decedent's vehicle which had been depleted through the use of a bill of interpleader in the federal district court. *Johnson v. Poore*, 266 Ark. 601, 587 S.W.2d 44 (1979).

### **—Mortgages.**

A mortgage was held enforceable after the mortgagor's death, so long as the debt was not barred, regardless of the statute of nonclaim. *Burlingham v. Hutchins*, 184 Ark. 764, 43 S.W.2d 362 (1931) (decision under prior law).

A mortgagee was not required to file a verified demand within the period of the statute of nonclaim for proceeds of fire insurance on decedent's property insured for benefit of mortgagee, inasmuch as these proceeds had not come into the administrator's hands as an asset of the estate, but as a trust fund. *Sharp v. Pease*, 193 Ark. 352, 99 S.W.2d 588 (1936) (decision under prior law).

### **—Personal Injuries.**

The statute of nonclaim and not § 16-62-101 governs claims for personal injuries resulting from an automobile collision alleged to have been caused by the negligence of a decedent. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970).

Injury and death claims must be filed with the estate within six months from the date of the first publication of notice in order for the probate estate to be liable; otherwise, they are barred. *Dodson v.*

Charter Behavioral Health Sys., 335 Ark. 96, 983 S.W.2d 98 (1998).

The service of a complaint against an estate for personal injuries does not satisfy the statutory requirement for filing a claim with the estate. *Dodson v. Charter Behavioral Health Sys.*, 335 Ark. 96, 983 S.W.2d 98 (1998).

#### —Revival of Claims.

A claim against an estate once barred by the statute of nonclaim could not be revived by the actions of the administrator in making payments on account. *Rhodes v. Cannon*, 112 Ark. 6, 164 S.W. 752 (1914) (decision under prior law).

#### —Rule of Limitations.

The statute of nonclaim, and not the general statute of limitations, gave the rule of limitation to claims against the estates of deceased persons not barred at the time of the death of the debtor. *Biscoe v. Madden*, 17 Ark. (4 Barber) 533 (1856) (decision under prior law).

#### —Tolled.

The exhibition of a claim, properly authenticated, to an administrator arrested the statute of nonclaim, and the law did not thereafter limit the time of presentation of the rejected claim to the court for classification. *Randolph v. Ward*, 29 Ark. 238 (1874) (decision under prior law).

Although the statute of nonclaim was tolled as to the elements of damage for which a serviceman, as husband and father, pursuant to the Soldiers' and Sailors' Civil Relief Act, was entitled to recover from the estate of decedent for injuries sustained in an automobile collision involving a vehicle driven by the decedent, it was not tolled with respect to the action brought by the serviceman, in a representative capacity on behalf of his wife and minor child, as to recovery of damages to which they were entitled, each in their own personal right. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970).

#### —Waiver.

The requirement that a claim be presented to the administrators within the time fixed by law or be barred under the nonclaim statute was waived when the administrators failed to plead the nonclaim statute at the time the claim was allowed by the court, so that the adminis-

trators could not later have the order approving the claim set aside, because the claim was not filed within the statutory time. *Southern Furn. Co. v. Morgan*, 214 Ark. 182, 214 S.W.2d 905 (1948) (decision under prior law).

The failure of an administrator to deny a claim filed in behalf of the wrong claimant until after the statute of nonclaims has run against the claim of the proper claimant does not constitute a waiver of the right to resist the claim filed. *Chronister v. Custer*, 237 Ark. 522, 374 S.W.2d 357 (1964).

#### Time for Filing.

Where a claimant filed a claim against the estate of a deceased more than six months after the first notice to creditors but less than six months after the heirs had filed their waivers of notice, the claim was properly disallowed. *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963) (decision under prior law).

An action against the estate of a decedent for personal injury committed by him must be filed within the period of limitation prescribed by this section even though the plaintiff is looking not to the assets of the estate but to the decedent's liability insurer for payment of his judgment. *Swan v. Estate of Monette ex rel. Monette*, 265 F. Supp. 362 (W.D. Ark. 1967), *aff'd*, 400 F.2d 274 (8th Cir. Ark. 1968).

Where the Arkansas trial court made no finding regarding the solvency of the decedent's estate, it was improper for the trial court to grant summary judgment on the Tennessee creditors' claims against the estate. There was no evidence to indicate that the creditors properly presented their claims in the ancillary action in the manner required by Arkansas law and within the time permitted by subdivision (a)(1) of this section. *Ellingsen v. King*, 2009 Ark. App. 655, — S.W.3d — (2009).

#### Tort Claims.

Under subsection (f) of this section, two litigants may have absolutely identical causes of action, but only one litigant can bring suit if only that litigant will be able to sue on applicable insurance coverage; the litigant who is not lucky enough to be able to sue against an insurance policy will be time-barred. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).



Action for wrongful death brought against the personal representative of the estate of defendant to recover insurance proceeds from a policy held by the estate would have been time-barred by subsection (a) of this section were it not for the fact that tort claims that can be recovered entirely from insurance proceeds are exempt from subsection (a) pursuant to subsection (f). *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

The court denied a writ of prohibition on the plaintiffs' tort claims against an estate, because subsections (a) and (f) of this section authorize and extend tort actions for personal injuries where there was a liability insurance policy in force on the decedent's vehicle at the time of the accident, even though the statute of nonclaim

has expired. *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (Ark. 1997).

**Wrongful Ouster.**

Where a lessor failed to terminate a year-to-year tenancy relationship with the lessee by giving the required notice before her death, but lessee was nevertheless ousted from the leased premises by the deceased lessor's administrator prior to the end of the term of the lease, a judgment against the estate for wrongful ouster arose as a cost of administration and was not barred by this section. *Brickey v. Lacy*, 247 Ark. 906, 448 S.W.2d 331 (1969).

**Cited:** *Bostic v. Bostic Estate*, 281 Ark. 167, 662 S.W.2d 815 (1984); *In re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993).

**28-50-102. Commencement or revival of actions.**

(a) The provisions of § 28-50-101 shall not preclude the commencement or continuance of separate actions against the personal representative as such for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in § 28-50-101.

(b) Any action pending against any person at the time of his or her death, which survives against the personal representative, shall be considered a claim duly filed against the estate from the time the action is revived, and any action commenced against a personal representative as such after the death of the decedent shall be considered a claim duly filed against the estate from the time such an action is commenced, if, within the time required by § 28-50-101 for filing claims against the estate, the plaintiff in the action files with the circuit court in which the estate is being administered a copy of the petition for revivor or of the complaint or a statement signed by the plaintiff or his or her attorney setting forth a description of the nature of the action, the claim, or demand involved, the parties to the action, and the court in which the action is pending.

(c) Nothing in this section shall impair the individual liability of the personal representative for his or her own acts and contracts in the administration of the estate.

**History.** Acts 1949, No. 140, § 111; A.S.A. 1947, § 62-2602.

**CASE NOTES**

**ANALYSIS**

Construction.  
Purpose.

Actions Against Administrators.  
Affidavit.  
Claims Barred.  
Cross-Claims.

Failure to File Pleadings in Probate Proceeding.

Foreclosure of Mortgages.

Limitation of Actions.

Original Actions.

Revival as Presentation.

Tolling of Time Limitations.

### **Construction.**

Section 28-50-101(f) does not repeal this section by implication. *Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996).

### **Purpose.**

The purpose of this section's requirements in filing of claims against estates is to effect and facilitate the payment of just claims against the estate within the specified time and not to defeat a just claim on a technicality that might entrap the claimant. *Jones v. Arkansas Farmers Ass'n*, 232 Ark. 186, 334 S.W.2d 887 (1960).

### **Actions Against Administrators.**

The bringing of an action against an administrator as such in proper time after his appointment was a legal presentation of the claim, but bringing an action against an administrator personally could not be treated as a legal presentation. *Easley v. Rowe*, 138 Ark. 58, 210 S.W. 145 (1919) (decision under prior law).

### **Affidavit.**

No affidavit was required upon the revival of action under former statute. *Goodrich v. Fritz*, 9 Ark. (4 English) 440 (1849) (decision under prior law).

### **Claims Barred.**

Where claim against the estate of a deceased was barred by this section, a personal injury claimant was not entitled to the appointment of a special administrator for the purpose of service of process to assert such rights as he might have had against the decedent's insurance carrier, as the administration of the estate had been completed, the executor discharged, and no claim filed in the estate. *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970).

After the expiration of the period allowed by this section for the filing of claims against an estate, one claiming damages for the alleged negligence of the decedent could not have a special administrator appointed to receive process, be-

cause his delay in filing his claim was alleged to have been induced by the liability insurance carrier of decedent fraudulently representing that it would settle the claim as soon as the claimant's injuries could be evaluated. *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970).

### **Cross-Claims.**

The reference in this section to any action includes a cross action, and in compliance with this section, a copy of a cross complaint must be filed with the probate court; otherwise, the failure to comply with this requirement is a bar to the cross-claim. *Wolfe v. Herndon*, 234 Ark. 543, 353 S.W.2d 540 (1962).

### **Failure to File Pleadings in Probate Proceeding.**

Personal injury action against a defendant who died prior to trial was dismissed for failure to file copies of the pleadings in the probate proceeding, and plaintiff's argument, raised first on appeal, that it was not necessary to file the pleading in the probate proceeding because the same attorneys were representing the plaintiff and defendant's administrator did not justify reversal. *Hettel v. Rye*, 251 Ark. 868, 475 S.W.2d 536 (1972).

### **Foreclosure of Mortgages.**

Where for many years a landlord advanced a decedent money and supplies for cultivation of land and in addition to the landlord's lien he also had two mortgages as security, the court held that none of the indebtedness of the decedent to the landlord was barred by the statute of limitation, because no limitation had run before decedent's death, there was nothing to show any holding adverse to landlord's mortgages, and there had been no administration on the estate of decedent; therefore the landlord was entitled to foreclose his mortgages for whatever amount the decedent owed him at the time of his death, less whatever amounts the decedent's children had paid on the indebtedness. *Goins v. Sneed*, 229 Ark. 550, 317 S.W.2d 269 (1958).

### **Limitation of Actions.**

Although no affidavit was required upon the revival of actions under former statute, yet, if they are not revived against the executor or administrator within the period prescribed, the claim will be



barred. *State Bank v. Tucker*, 15 Ark. (2 Barber) 39 (1854) (decision under prior law).

An action against the estate of a decedent for personal injury committed by him must be filed within the period of limitation of § 28-50-101 even though the plaintiff is looking not to the assets of the estate but to the decedent's liability insurer for payment of his judgment. *Swan v. Estate of Monette ex rel. Monette*, 265 F. Supp. 362 (W.D. Ark. 1967), *aff'd*, 400 F.2d 274 (8th Cir. Ark. 1968).

An action to recover for injuries sustained in an automobile collision involving a vehicle driven by a decedent was barred under this section where it was not instituted until more than six months after the administrator's first notice to creditors was published. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970) (decision prior to 1985 amendment).

#### **Original Actions.**

Where an action was brought for an accounting against a corporate officer whose death occurred after service of notice but before a defensive pleading was fixed, an executor could not maintain an action to prohibit the chancery court from proceeding with the original action. *Rider v. Cunningham*, 232 Ark. 407, 337 S.W.2d 868 (1960).

#### **Revival as Presentation.**

After a judgment of revival, no presentation of claim to administrator was necessary. *Eidins v. Graddy*, 28 Ark. 500 (1873) (decision under prior law).

Revival of a suit within the proper time amounted to presentation of claims to administrator. *Hill v. Brittain*, 178 Ark. 784, 12 S.W.2d 869 (1929) (decision under prior law).

#### **Tolling of Time Limitations.**

Although the statute of nonclaim was tolled as to the elements of damage for which a serviceman, as husband and father, pursuant to the Soldiers' and Sailors' Civil Relief Act, was entitled to recover from the estate of decedent for injuries sustained in an automobile collision involving a vehicle driven by the decedent, it was not tolled with respect to the action brought by the serviceman, in a representative capacity on behalf of his wife and minor child, as to recovery of damages to which they were entitled, each in their own personal right. *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970).

**Cited:** *Pritchard v. Downie*, 216 F. Supp. 621 (E.D. Ark. 1963); *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963); *Eddleman v. Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987).

### **28-50-103. Form and verification of claims.**

(a) No claim shall be allowed against an estate on application of the claimant unless it shall be in writing, describe the nature and the amount of the claim, if ascertainable, and be accompanied by the affidavit of the claimant or someone for him or her that the amount is justly due or, if not yet due, when it will or may become due, that no payments have been made on the claim which are not credited, and that there are no offsets to the claim, to the knowledge of the affiant, except as stated in the claim.

(b) If the claim is contingent, the nature of the contingency shall be stated also.

(c) If the claim has been assigned after the death of the decedent, the affidavit required in this section shall be made by or on behalf of the person owning the claim at the date of death of the decedent and by or on behalf of the assignee.

(d) If a claim is founded on a written instrument, the original or a copy thereof with all endorsements must be attached to the claim.

(e) The original instrument must be exhibited to the personal representative or court, upon demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

**History.** Acts 1949, No. 140, § 112;  
A.S.A. 1947, § 62-2603.

## CASE NOTES

### ANALYSIS

Applicability.

Affidavits.

—Attorneys.

—Cashiers or Treasurers.

—Clergy.

—Corporate Secretaries.

—Decedent's Lifetime.

—Exhibition.

—Insufficient Compliance.

—Prerequisite.

—Requirement.

—Sufficient Compliance.

—Unnecessary.

—Wording.

Authentication.

—Additions.

—Agents or Attorneys.

—Insufficient Compliance.

—Requirement.

—Signatures.

—Sufficient Compliance.

Claims.

—Amendments.

—Heirs.

—Subsequent to Suits.

Deviations from Statutory Form.

Forgery.

Payment Without Probate.

Promissory Notes.

Recovery of Payments.

Subrogation.

Substantial Compliance.

Waiver of Insufficiency.

Waiver of Notice Requirement.

### Applicability.

Former statute applied only to an assignor or assignee in fact and had no applicability to a court or its commissioner and the purchaser or vendee at a judicial sale. Triplett v. Attwood, 133 Ark. 181, 202 S.W. 817 (1918) (decision under prior law).

### Affidavits.

An affidavit by a person other than the claimant will not be sufficient unless it states that the affiant was acquainted with the facts sworn to or has made diligent inquiry. Lanigan v. North, 69 Ark. 62, 63 S.W. 62 (1901) (decision under prior law).

### —Attorneys.

An affidavit by a creditor's attorney was good. Miller v. Fearis, 184 Ark. 858, 44 S.W.2d 343 (1931) (decision under prior law).

### —Cashiers or Treasurers.

An affidavit which did not recite in it that the affiant was the cashier of a corporation or treasurer was not sufficient. Arkmo Lumber Co. v. Cantrell, 159 Ark. 445, 252 S.W. 901 (1923) (decision under prior law).

Where the affiant was a bookkeeper and cashier of a corporation, it was proper to treat the affidavit as having been made by the cashier notwithstanding it was verified by him as the bookkeeper. Breckenridge v. Weber Dry Goods Co., 167 Ark. 429, 268 S.W. 593 (1925) (decision under prior law).

### —Clergy.

A priest who was duly appointed and authorized to take and collect subscriptions to erect a church organ was a proper party to make an affidavit in proof of a claim on such a subscription against a decedent. Wells v. Costello, 189 Ark. 116, 70 S.W.2d 561 (1934) (decision under prior law).

### —Corporate Secretaries.

An affidavit made by the secretary of a corporation was not sufficient. Superior Oil & Gas Co. v. Sudbury, 146 Ark. 319, 225 S.W. 609 (1920) (decision under prior law).

### —Decedent's Lifetime.

An affidavit, substantially in the form required by former statute, made in the lifetime of a decedent would not authorize the allowance of the claim against his estate. Wilkerson v. Garden, 48 Ark. 360, 3 S.W. 183 (1887) (decision under prior law).

### —Exhibition.

If a suit was controverted, it was not indispensable that an affidavit was exhibited before the suit was brought. Maddin v. State Bank, 13 Ark. (8 English) 276 (1853) (decision under prior law).



**—Insufficient Compliance.**

An affidavit that the facts were true and correct was not in substantial compliance with former statute. *Rinehart v. Wheeler*, 168 Ark. 251, 270 S.W. 537 (1925) (decision under prior law).

**—Prerequisite.**

Unless an affidavit was made before the commencement of an action upon a claim, the action should be dismissed. *Ross v. Huil*, 48 Ark. 304, 3 S.W. 190 (1887) (decision under prior law).

An affidavit was a prerequisite to a right of action on a demand against an estate, but it did not have to be exhibited to the administrator; although if not exhibited, the claimant could not recover costs. *Wilkerson v. Eads*, 97 Ark. 296, 133 S.W. 1039 (1911) (decision under prior law).

**—Requirement.**

Compliance with former statute was mandatory, and in the absence of such compliance, a nonsuit would be ordered unless an affidavit was produced at the trial. *Hardy v. Hardy*, 198 Ark. 1021, 132 S.W.2d 365 (1939) (decision under prior law).

**—Sufficient Compliance.**

In a suit by the assignee of a note against the administrator of the maker, affidavits of the nonpayment of the note by the payee and the assignee while in their hands respectively were proper. *Stone v. Kaufman & Co.*, 25 Ark. 186 (1867) (decision under prior law).

An affidavit to a note given by a firm to the effect that nothing has been paid upon it, although not alleging that the amount was due from the estate of a deceased member of the firm, was sufficient. *Smith & Bro. v. Van Gilder*, 26 Ark. 527 (1871) (decision under prior law).

Where a claimant had a claim against an estate in the form of a note, the filing of a verbatim copy thereof with an affidavit attached was sufficient compliance with former statute. *Davenport v. Davenport*, 110 Ark. 222, 161 S.W. 189 (1913) (decision under prior law).

Although, in an action against an administrator for an accounting of a trust estate of which the deceased was a trustee, the affidavit attached to the complaint was not in compliance with former statute, where the pleadings showed that

a properly verified statement of account was presented to administrator, the statute was sufficiently complied with. *Lasker-Morris Bank & Trust Co. v. Gans*, 132 Ark. 402, 200 S.W. 1029 (1918) (decision under prior law).

**—Unnecessary.**

Although no affidavit of assignor was attached to the complaint and the defendant pleaded statute of nonclaim, insisting that note was not presented to administrator in time and manner required by law, the court was justified in finding statute of nonclaim did not apply where administrator admitted in answer that the note, duly verified by both assignor and assignee, was presented to him and his attorney made admission in open court that it was done in proper time. *Potts v. Brotherton*, 197 Ark. 556, 124 S.W.2d 5 (1939) (decision under prior law).

**—Wording.**

An affidavit by an officer of a corporation in a form prescribed by former statute, omitting the words "that sum demanded is justly due" was sufficient. *State use of State Bank v. Collins*, 16 Ark. (3 Barber) 32 (1855) (decision under prior law).

An affidavit to a claim against an estate which alleged that the account was "just and true" and that the amount named "is justly due after all just credits have been given" was a substantial compliance with former statute. *Eddy v. Loyd*, 90 Ark. 340, 119 S.W. 264 (1909) (decision under prior law).

A verification of a claim against an estate containing a clause "that the above account is true and just and unpaid after allowing all due credits and set-offs" was in substantial compliance with former statute. *Breckenridge v. Weber Dry Goods Co.*, 167 Ark. 429, 268 S.W. 593 (1925) (decision under prior law).

**Authentication.**

Verification by one cognizant of the facts or by an agent or attorney was sufficient. *Mason v. Bull, Ellis & Co.*, 26 Ark. 164 (1870) (decision under prior law).

The authentication required by former statute referred to suits against executors and administrators to subject the general assets of the estate to the payment of debts. *Arkmo Lumber Co. v. Cantrell*, 159

Ark. 445, 252 S.W. 901 (1923) (decision under prior law).

#### —Additions.

It was not contemplated by former statute that where a debt is assigned after it had been presented with proper authentication to an executor or administrator that any further or additional authentication should be necessary. *Collier v. Trice*, 79 Ark. 414, 96 S.W. 174 (1906) (decision under prior law).

#### —Agents or Attorneys.

Under former statute, the agents or attorneys of all persons, including corporations, were allowed and authorized to authenticate the claims of their principals against the estate of deceased persons. *Orene Parker Co. v. Emerson*, 91 Ark. 256, 120 S.W. 968 (1909) (decision under prior law).

The effect of former statute was to allow and authorize the agents or attorneys of all persons, including corporations, to authenticate the claims of their principals against the estates of deceased persons. *Orene Parker Co. v. Emerson*, 91 Ark. 256, 120 S.W. 968 (1909) (decision under prior law).

#### —Insufficient Compliance.

The probate of a claim against an estate made before a justice of the peace of another state whose official character was not authenticated was insufficient. *Alter v. Kinsworthy*, 30 Ark. 756 (1875) (decision under prior law).

#### —Requirement.

All claims had to be authenticated. *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S.W. 868 (1899) (decision under prior law).

A claim had to be authenticated although an administrator knows of its existence. *Kaufman Bros. v. Redwine*, 97 Ark. 546, 134 S.W. 1193 (1911) (decision under prior law).

#### —Signatures.

The affidavit did not have to be signed by the affiant. *Mahan v. Owen*, 23 Ark. (10 Barber) 347 (1861) (decision under prior law).

#### —Sufficient Compliance.

A claim against an administrator as such was sufficiently authenticated where the claimant, after directing his son to

sign his name to the claim, appeared before an officer and acknowledged and approved the signature. *Chipman v. Perdue*, 135 Ark. 559, 205 S.W. 892 (1918) (decision under prior law).

#### Claims.

##### —Amendments.

It was not error for court to allow a claimant to amend his claim to show it was for professional services when such an amendment followed a motion to make more definite and certain. *Panick v. McLendon*, 241 Ark. 576, 409 S.W.2d 497 (1966).

##### —Heirs.

The heirs of a deceased whose estate was not administered upon had the right to file a claim in their own names for room and board furnished by the deceased against the estate of deceased debtor, the claim being filed in the language of former statute. *Morris v. Arrington*, 215 Ark. 564, 221 S.W.2d 406 (1949) (decision under prior law).

##### —Subsequent to Suits.

Where a son brought a suit to establish a contract with his deceased father and the court found against him, he was not later precluded from filing a claim against the estate for services rendered. *Harris v. Whitworth*, 213 Ark. 480, 211 S.W.2d 101 (1948) (decision under prior law).

#### Deviations from Statutory Form.

It is essential that a claim against an estate be supported by an affidavit in statutory form, and relatively slight deviations from the statutory language may be fatal to the validity of the claim. *Shelton v. Harris*, 225 Ark. 855, 286 S.W.2d 20 (1956).

#### Forgery.

The alteration of the indorsement of disallowance on a claim filed with an administrator was sufficient to support a charge of forgery. *Quertermous v. State*, 114 Ark. 452, 170 S.W. 225 (1914) (decision under prior law).

#### Payment Without Probate.

An executor was not entitled to credit for claim against the estate which he paid and which was not verified and approved by the probate court, since statutes, with reference to verification and probation of



claims, were mandatory and a will's direction to pay all just debts did not authorize payment without probate. *Acker v. Watkins*, 193 Ark. 192, 100 S.W.2d 78 (1936) (decision under prior law).

#### **Promissory Notes.**

At the trial of a claim against a decedent's estate based upon a promissory note, though execution thereof had not been denied under oath before trial, the trial court properly requested claimant to identify the note in the absence of an affidavit and a copy of the note. *George v. Davie*, 201 Ark. 470, 145 S.W.2d 729 (1940) (decision under prior law).

#### **Recovery of Payments.**

Even though a claim paid was barred by the statute of nonclaim, the money could not be recovered. *Rhodes v. Driver*, 108 Ark. 80, 157 S.W. 147 (1913) (decision under prior law).

#### **Subrogation.**

An executor who paid claims without claimant complying with former statute was not entitled to be subrogated to the rights of creditors whose claims he wrongfully paid. *Acker v. Watkins*, 199 Ark. 573, 134 S.W.2d 523 (1939) (decision under prior law).

#### **Substantial Compliance.**

While the provisions of former statute were mandatory, a substantial compliance was sufficient. *Little v. Arkansas Trust & Banking Co.*, 124 Ark. 466, 187 S.W. 629 (1916) (decision under prior law).

Claim of a passenger's administrator against a pilot's estate arising out of the wrongful death of the passenger was in substantial compliance with this section because it did provide reasonable notice

and relevant information to a pilot's administrator of a wrongful death action and allowed the pilot's administrator to make an informed decision. Attached to the claim was an order approving the retainer agreement between the passenger's estate and an attorney, which provided that it covered the claim against any insurance company of the pilot and the manufacturer or mechanic of the airplane. *Banks v. Landry*, 103 Ark. App. 47, 286 S.W.3d 183 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 627 (Aug. 20, 2008).

#### **Waiver of Insufficiency.**

Where no objection is made by an executor or administrator against the sufficiency of the form in which a claim is stated, he may be deemed to have waived the insufficiency. If the executor or administrator relies on defects in form in refusing to allow a claim, he should make known his objection seasonably. *Jones v. Arkansas Farmers Ass'n*, 232 Ark. 186, 334 S.W.2d 887 (1960).

#### **Waiver of Notice Requirement.**

Where eight claims were allowed by a court on the same day and the administrators subsequently filed a motion to vacate only one of the claims on the ground that the required notice of the hearing of a claim was not given them, it was probable that the administrators were present at the time of the hearing and the requirement was therefore waived, as participation in proceedings was a waiver of the notice requirement. *Southern Furn. Co. v. Morgan*, 214 Ark. 182, 214 S.W.2d 905 (1948) (decision under prior law).

**Cited:** *Wolfe v. Herndon*, 234 Ark. 543, 353 S.W.2d 540 (1962).

### **28-50-104. Presentation and filing of claims.**

(a)(1) A person having a claim against an estate may present it to the personal representative, properly verified, for approval.

(2) The personal representative shall endorse upon the claim the date of the presentation to him or her, his or her approval or disapproval of the claim, and, if approved, the classification of the claim, and he or she shall sign the endorsement.

(3) A claim approved by the personal representative must be filed with the court by or on behalf of the claimant within thirty (30) days after the expiration of six (6) months from the date of the first

publication of the notice to creditors or it shall be barred, as provided in § 28-50-101.

(4) A claim, disapproved or not acted upon by the personal representative, must be filed with the court by or on behalf of the claimant within the period fixed by § 28-50-101 or within thirty (30) days after the date of its presentation to the personal representative, whichever shall be the later date, or it shall be barred, as provided in § 28-50-101.

(b) As an alternative to the procedure set forth in subsection (a) of this section, a person having a claim against an estate may file it with the court, whereupon the clerk shall notify the personal representative, by ordinary mail, of the filing of the claim.

**History.** Acts 1949, No. 140, § 113; 1967, No. 287, § 9; A.S.A. 1947, § 62-2604.

## CASE NOTES

### ANALYSIS

Purpose.  
Authentication.  
Cestui Que Trusts.  
Conditional Sales Contracts.  
Demands.  
Effect of Allowance by Court.  
Evidence of Claims.  
Federal Preemption.  
Fraud.  
Garnishment.  
Jurisdiction.  
Necessity of Notice.  
Notice to Personal Representative.  
Requirements Mandatory.  
Statement of Account.  
Statutory Liabilities.  
Substantial Compliance.  
Transfer to Equity.  
Waiver of Exhibition.  
Waiver of Notice.

### Purpose.

The purpose of this section is to effect and facilitate the payment of just claims against an estate within the specified time and not to defeat a just claim on a technicality that might entrap a claimant. *Jones v. Arkansas Farmers Ass'n*, 232 Ark. 186, 334 S.W.2d 887 (1960).

### Authentication.

It was not contemplated that where a debt was assigned after it had been properly presented to an executor or administrator any further authentication would be necessary. *Collier v. Trice*, 79 Ark. 414,

96 S.W. 174 (1906) (decision under prior law).

### Cestui Que Trusts.

Former statute applied to a claim of cestui que trust against the estate of a deceased trustee. *Johnson v. Umsted*, 64 F.2d 316 (8th Cir. 1933) (decision under prior law).

### Conditional Sales Contracts.

The filing of a claim by a seller, which was allowed by the buyer's administrator, did not, alone, amount to a waiver of the retention of title to fixtures under a conditional sales contract. *Franklin Sav. Bank v. Garot*, 69 F.2d 487 (8th Cir. 1934) (decision under prior law).

### Demands.

The term "demand" was held to include all claims capable of assertion against an estate. *Hayden v. Hayden*, 105 Ark. 95, 150 S.W. 415 (1912) (decision under prior law).

Persons having claims based on a written contract had to present a copy of them, together with the original, to the executor or administrator, before the claimant could have judgment in a probate court. *Friend v. Patterson*, 150 Ark. 577, 234 S.W. 978 (1921) (decision under prior law).

Where the Arkansas trial court made no finding regarding the solvency of the decedent's estate, it was improper for the trial court to grant summary judgment on the Tennessee creditors' claims against the estate. There was no evidence to indi-



cate that the creditors properly presented their claims in the ancillary action in the manner required by Arkansas law and within the time permitted by subdivision (a)(3) of this section. *Ellingsen v. King*, 2009 Ark. App. 655, — S.W.3d — (2009).

### **Effect of Allowance by Court.**

A probate court allowance had the force and dignity of a judgment; but no execution could be issued upon it nor demand made upon the personal representatives until payment was ordered by the court; and the court must not order payment until it first ascertained all the debts of its class and those having precedence and the amount of the assets. *Fort v. Blagg*, 38 Ark. 471 (1882) (decision under prior law).

### **Evidence of Claims.**

Upon the presentation of a claim for allowance, an administrator was entitled to, and could require, the claimant to furnish him a copy of the account or evidence of debt upon which the claim was founded, but could also waive the copy. *Borden v. Fowler*, 14 Ark. (1 Barber) 471 (1854); *Grimes v. Booth*, 19 Ark. (6 Barber) 224 (1857) (decisions under prior law).

### **Federal Preemption.**

Where an executor chooses a federal forum to litigate all claims against an estate under rights conferred by 46 U.S.C. Appx. §§ 182-189, and matters of procedure under federal statute are in conflict with provisions of § 28-50-101 and this section, the federal statutes will govern. *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972).

Where an executor chooses a federal forum to litigate all claims against an estate under 46 U.S.C. §§ 182-189, and federal district court issues an injunction barring all actions, suits, and proceedings against estate other than those filed with the district court clerk, the failure by the claimants against an estate to comply with § 28-50-101 by presenting claims to the personal representative of the estate is not ground for dismissal of the claims since, under this section, claims presented to the personal representative must thereafter be filed with the court and such a proceeding would be expressly forbidden by the district court's injunction. *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972).

### **Fraud.**

The failure of an administrator to comply literally with requirements of former

statute was not sufficient to show fraud in allowing and paying claims. *Walls v. Phillips*, 204 Ark. 365, 162 S.W.2d 59 (1942) (decision under prior law).

### **Garnishment.**

An administrator was held not subject to garnishment. *Gill v. Middleton*, 60 Ark. 213, 29 S.W. 465 (1895) (decision under prior law).

### **Jurisdiction.**

An order of a probate court allowing a claim against an estate, presented for allowance at a term subsequent to the term at which the administrator was notified that it would be presented, was without jurisdiction of the person of the administrator and void. *Baskins v. Wylds*, 39 Ark. 347 (1882) (decision under prior law).

### **Necessity of Notice.**

The clause of a former statute requiring notice to be given an executor or administrator of an application was imperative; a probate court could take no jurisdiction of his person until the notice was given or waived. *Pennington's Adm'x v. Gibson*, 6 Ark. (1 English) 447 (1845) (decision under prior law).

Before a creditor could apply to a probate court to allow and class his claim against the estate of a deceased person, he had to first present it to the administrator for allowance and, upon his refusal to allow the claim, give him due notice of his intended application to the probate court. *Hudson v. Breeding*, 7 Ark. (2 English) 445 (1847) (decision under prior law).

### **Notice to Personal Representative.**

A personal delivery of a copy of a claim to the personal representative is sufficient compliance with the requirement of sending notice by registered mail. *Merritt v. Rollins*, 231 Ark. 384, 329 S.W.2d 544 (1959) (decision prior to 1967 amendment).

Notice to a personal representative may be given before or after a claim has been filed with a court when both events take place on the same day. *Merritt v. Rollins*, 231 Ark. 384, 329 S.W.2d 544 (1959).

A trial court was not justified in striking a claim where, due to recitation of the name of the wrong county in caption, the county clerk failed to give notice to an executor as provided by this section, since

executor's attorney received a copy of the claim within the statutory period for notice. *Edwards v. Brimm*, 236 Ark. 588, 367 S.W.2d 433 (1963).

### **Requirements Mandatory.**

An executor was not entitled to credit for claims against an estate which he paid and which were not verified and approved by the probate court, since statutes with reference to verification and probate of claims were held to be mandatory and a will's direction to pay all just debts did not authorize payment without probate. *Acker v. Watkins*, 193 Ark. 192, 100 S.W.2d 78 (1936) (decision under prior law).

### **Statement of Account.**

A statement of an account against an estate, setting out the amounts of shipments of merchandise as of certain dates and credits thereon, was sufficiently itemized under former statute. *Breckenridge v. Weber Dry Goods Co.*, 167 Ark. 429, 268 S.W. 593 (1925) (decision under prior law).

### **Statutory Liabilities.**

An action by bank commissioner against the executor of a deceased stockholder to recover assessment on bank stock should not have been dismissed for failure to exhibit claim to the probate court for allowance, as it was not a claim based on contract or torts, but was a statutory liability. *Berlin v. Rainwater*, 174 Ark. 66, 294 S.W. 368 (1927) (decision under prior law).

### **Substantial Compliance.**

Where a person had a claim against an estate in the form of a note, the filing of a verbatim copy thereof with an affidavit attached was substantial compliance with former statute. *Davenport v. Davenport*, 110 Ark. 222, 161 S.W. 189 (1913); *Keffer v. Stuart*, 127 Ark. 498, 193 S.W. 83 (1917) (decisions under prior law).

A claim for balance due on mortgage containing affidavit that the claim was founded on a promissory note, that a true copy thereof was attached as an exhibit, and that the original had been exhibited to executor and was held subject to his inspection and to the orders of the court was in substantial compliance with former statute. *Driver v. Driver*, 200 Ark. 500, 139 S.W.2d 401 (1940) (decision under prior law).

Substantial compliance with the requirements of law for the presentation of claims is sufficient. *Merritt v. Rollins*, 231 Ark. 384, 329 S.W.2d 544 (1959).

### **Transfer to Equity.**

An executor's motion to transfer a cause to equity on appeal from probate court's judgment restating the account of the executor and charging him with demands paid out by him and not probated in the manner prescribed by statute, on ground that the executor was entitled to subrogation as to the rights of creditors of the estate whose claims had been discharged, was properly denied. *Watkins v. Acker*, 195 Ark. 203, 111 S.W.2d 458 (1937) (decision under prior law).

### **Waiver of Exhibition.**

Executors having knowledge that a note signed by their testator was due and unpaid could waive exhibition of the original note. *Abston-Wynne & Co. v. Wasson*, 186 Ark. 929, 56 S.W.2d 1029 (1933) (decision under prior law).

### **Waiver of Notice.**

The appearance of an administrator in a probate court on an application for the allowance of a claim against him as administrator and his consent to a continuance were substantive acts dispensing with service of process and making him a party to the cause. *Rogers v. Conway*, 4 Ark. (4 Pike) 70 (1842); *State Bank v. Walker*, 14 Ark. (1 Barber) 234 (1853) (decisions under prior law).

Where an administrator sued in a probate court appeared and contested a claim, he waived the objection of want of prior presentation to him for allowance of the claim sued on. *Leake & Harvey v. Sutherland*, 25 Ark. 219 (1868) (decision under prior law).

A waiver of notice indorsed on a claim was tantamount to a rejection and reference of it to a probate court. *Randolph v. Ward*, 29 Ark. 238 (1874) (decision under prior law).

If an administrator appeared and did any substantive act in a cause, before judgment, it would be a waiver of notice. *Baskins v. Wylde*, 39 Ark. 347 (1882) (decision under prior law).

**Cited:** *Boyd v. Matthews*, 239 Ark. 112, 388 S.W.2d 102 (1965); *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).



**28-50-105. Allowance of claims.**

(a)(1) Except as provided in subsections (b) and (c) of this section, no claimant shall be entitled to payment unless his or her claim shall have been duly filed with and allowed by the court.

(2) Except in the case of the personal representative's own claim, any claim which is approved by him or her in writing and which has been duly filed may be allowed by the court at any time without formal hearing.

(3) A claim which has been disapproved or not acted upon by the personal representative shall be set by rule or order of the court for a hearing on a day certain, and notice of the hearing shall be given by the clerk to the personal representative, to the claimant, and to other persons, if any, as the court may direct.

(4) Upon the adjudication of a claim, the court shall allow it in whole or in part and classify it or disallow it.

(5) The order allowing the claim shall have the effect of a judgment and bear interest at the legal rate unless the claim provides otherwise, in which case the judgment shall be rendered accordingly.

(6) Limitations shall begin to run the day the claim is allowed, and such an allowed claim may be revived in the same manner as judgments at law.

(b) Claims for expenses of administration may be allowed upon application of the claimant or of the personal representative, or may be allowed at any accounting, regardless of whether or not they have been paid by the personal representative.

(c)(1) Notwithstanding the provisions of § 28-50-103, the personal representative may pay reasonable funeral expenses and reasonable medical and other expenses incident to the last illness, as well as claims amounting in aggregate to three thousand dollars (\$3,000) or less, no one (1) of which shall exceed the sum of three hundred dollars (\$300), and he or she may take credit in his or her settlement.

(2) However, the burden shall be upon the personal representative, at the request of an interested person, to establish the validity of any such claim paid under this subsection.

(3) Objection to any payment made under this subsection shall be made within the time provided by the Probate Code for filing exceptions to the settlement and not thereafter.

**History.** Acts 1949, No. 140, § 114; 1967, No. 287, §§ 10, 11; A.S.A. 1947, § 62-2605; Acts 1987, No. 907, § 1.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

**U. Ark. Little Rock L.J.** Survey — Probate, 10 U. Ark. Little Rock L.J. 599.

## CASE NOTES

## ANALYSIS

In General.

Allowance Proper.

Conclusiveness of Allowance.

Effect of Allowance.

Equity Jurisdiction.

Expenses of Administration.

Illegality of Allowance.

Joint and Several Claims.

Medicaid Benefits.

Res Judicata.

Right of Appeal.

### In General.

The 1967 amendment of subsection (a) of this section was intended to change the holding of *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1887), that the 10-year statute of limitations generally applicable to judgments did not begin to run until the closing of an estate. This amendment was also intended to change the holding of *Rose v. Thompson*, 36 Ark. 254 (1880), that the statute for reviving judgments did not apply to probate court judgments.

### Allowance Proper.

Widow's argument that a circuit court erred in allowing a coexecutor of a decedent's estate any fee on his claim against the estate for legal services he provided from 1981 until the decedent's death failed because the widow did not contest the fact that the coexecutor provided the services reflected in his statement and, while the circuit court started with the premise that the coexecutor was to repay the entire amount of his claim, with interest, because the claim was originally paid without court approval, the circuit court then proceeded to consider the claim anew and determined that \$10,000 was a reasonable fee for the coexecutor's services to the decedent, under this section and § 28-50-107. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

### Conclusiveness of Allowance.

The allowance and classification of a claim were conclusive after the expiration of the term, and a court had then no power to set aside. *Cossit v. Biscoe*, 12 Ark. (7 English) 95 (1851); *McMorrin v. Overholt*,

14 Ark. (1 Barber) 244 (1853); *Jackson v. Gorman*, 70 Ark. 88, 66 S.W. 346 (1902) (decisions under prior law).

### Effect of Allowance.

A demand allowed, classified, and adjudged by a probate court had the same effect as a judgment. *Wright v. Campbell & Strong*, 27 Ark. 637 (1872); *Hoshall v. Brown*, 102 Ark. 114, 143 S.W. 1081 (1912). See also *Tate v. Norton*, 94 U.S. 746, 24 L. Ed. 222 (1877); *Shofner v. Jones*, 201 Ark. 540, 145 S.W.2d 350 (1940) (decisions under prior law).

It was not error for a probate court to grant the petition of an administrator to grant a lien upon a decedent's real estate and to revive a judgment allowing claims, as this section specifically gives an order allowing claims against an estate the effect of a judgment and § 28-1-104 gives the probate court the same powers to carry out its judgments as exist in courts of general jurisdiction. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

### Equity Jurisdiction.

Where it appeared that an administrator allowed a claim in part and rejected or failed to act upon the remainder and a probate court acted upon the allowance only, or the probate court allowed the entire claim, but, by mistake, judgment was entered for a lesser sum, the remedy in the probate court was adequate and resort to equity was unnecessary. *Page v. Ralph*, 55 Ark. 52, 17 S.W. 365 (1891) (decision under prior law).

Chancery could set aside an allowance for fraud. *Scott v. Penn*, 68 Ark. 492, 60 S.W. 235 (1900) (decision under prior law).

### Expenses of Administration.

Money advanced by a creditor to an administrator to improve the real estate of his intestate and to protect it against an attachment suit should have been allowed, if at all, as expenses of administration. *Nathan v. Lehman, Abraham & Co.*, 39 Ark. 256 (1882) (decision under prior law).

The probate judge has authority to approve legal fees in excess of the statutory legal fees under § 28-48-108(d) and to approve accounting fees under § 28-48-108(e). *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991).



**Illegality of Allowance.**

Illegality in the allowance of a claim could not be set up in a collateral proceeding. *Mays v. Rogers*, 37 Ark. 155 (1881) (decision under prior law).

**Joint and Several Claims.**

Where a guardian had died, his wards should have presented against his estate several claims for their respective shares and not a joint claim for the whole, but the probate court, being bound to no course of procedure, could sever a demand for the whole and allow to each the sum to which he was entitled. *Connelly v. Weatherford*, 33 Ark. 658 (1878) (decision under prior law).

**Medicaid Benefits.**

Section 20-76-436 creates a debt of medicaid payments upon the death of the recipient, which may be asserted as a claim against the estate; the probate court has jurisdiction over such a claim pursuant to subdivision (a)(4) of this section.

*Estate of Wood v. Arkansas Dep't of Human Servs.*, 319 Ark. 697, 894 S.W.2d 573 (1995).

**Res Judicata.**

A judgment of a probate court allowing and classifying a claim was res judicata as to all issues upon which it was based. *Miller v. Oil City Iron Works*, 184 Ark. 900, 45 S.W.2d 36 (1931) (decision under prior law).

**Right of Appeal.**

An administrator had the right to take an appeal from a judgment of a probate court rejecting his intestate's claim and prosecute it to the same extent his intestate might have done. *Davies v. Nichols*, 52 Ark. 554, 13 S.W. 129 (1890) (decision under prior law).

Devisees not being parties could not appeal from an order of allowance. *Scott v. Penn*, 68 Ark. 492, 60 S.W. 235 (1900) (decision under prior law).

**28-50-106. Classification and payment of claims.**

(a) At the time of their allowance, all claims shall be classified in one (1) of the following classes, and, if the applicable assets of the estate are insufficient to pay all claims, the personal representative shall make payment in the following order:

- (1) Costs and expenses of administration;
- (2) Reasonable funeral expenses, reasonable medical and other expenses incident to the last illness, and wages of employees of the decedent;
- (3) Claims based on a liability of the decedent for any state tax debt assessed against the decedent, or due at the time of his or her death, or due from the decedent's estate as a result of his or her death; and
- (4) All other claims allowed.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

**History.** Acts 1949, No. 140, § 115; A.S.A. 1947, § 62-2606; Acts 1995, No. 391, § 1.

**CASE NOTES**

ADMINISTRATOR'S DEATH.	EQUITY JURISDICTION.
Authentication.	Federal Courts.
Commissions.	Funeral Expenses.
	Insolvent Estate.
	Interment of Dead Body.

Judgment Claims.  
Loss of Priority.  
Medical Services.  
Premature Assignment.  
Proceedings in Courts.  
Setoff.  
Trustee's Indebtedness.

### **Administrator's Death.**

When an administrator died with assets due distributees, the trust estate in his hands became an indebtedness against the estate, which, like any other demand, had to be authenticated, allowed, and classed before payment. *Purcell v. Carter*, 45 Ark. 299 (1885) (decision under prior law).

### **Authentication.**

The fact that an administrator knew that a claim existed did not render its authentication unnecessary. *Kaufman Bros. v. Redwine*, 97 Ark. 546, 134 S.W. 1193 (1911) (decision under prior law).

The claim of a corporation against a decedent's estate had to be authenticated by the affidavit of the cashier or treasurer, the affidavit of the secretary being insufficient. *Superior Oil & Gas Co. v. Sudbury*, 146 Ark. 319, 225 S.W. 609 (1920) (decision under prior law).

### **Commissions.**

Unpaid real estate commissions due a salesman from a number of transactions over a period of years from a deceased broker were not "wages of employees" under subsection (a)(2) of this section, which are given priority where the applicable assets of the estate are insufficient to pay all the claims, but rather, were considered to be subsection (a)(3) claims. *Hicks v. McMinn*, 248 Ark. 783, 453 S.W.2d 728, 52 A.L.R.3d 936 (1970).

### **Equity Jurisdiction.**

A bill by a creditor of an estate to uncover assets and apply them to payment of debts should have been in behalf of all creditors of the same class, and if recovered, the court had to place the funds in a tribunal where the creditor might, with others, share pro rata, courts of equity having no power to order distribution. *Jackson v. McNabb*, 39 Ark. 111 (1882) (decision under prior law).

### **Federal Courts.**

A nonresident creditor, by suing in federal courts, could acquire no right to sub-

ject the assets of estate to seizure and sale for satisfaction of his debt, thereby placing himself in a favored position over other creditors contrary to state law. *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276, 22 L. Ed. 536 (1874) (decision under prior law).

### **Funeral Expenses.**

A widow had a right to pay the funeral expenses and to claim reimbursement as a creditor of the first class, but she could not wait more than six months and then receive the benefits of priority. *Burns v. Wegman*, 200 Ark. 225, 138 S.W.2d 389 (1940) (decision under prior law).

Reasonable cost of a tombstone was properly classed as a funeral expense. *Holt v. Cassinelli*, 203 Ark. 1138, 160 S.W.2d 877 (1942) (decision under prior law).

### **Insolvent Estate.**

Because an estate was insolvent, the probate court correctly ordered the estate assets sold to pay claims and expenses of administration. *Acklin v. Riddell*, 42 Ark. App. 230, 856 S.W.2d 322 (1993).

### **Interment of Dead Body.**

A widow, later appointed administrator, confused the liability of the widow for the funeral expenses with the liability of the estate of the deceased for these expenses, and since it goes without question that the estate of the decedent is chargeable for the reasonable and necessary expense of interment, as it was stipulated that the funeral director's claim was reasonable, it would go without question that interment of the dead body was a necessary expense, and in fact was a necessary undertaking. *Dutton v. Brashears Funeral Home*, 235 Ark. 120, 357 S.W.2d 265 (1962).

### **Judgment Claims.**

A claim founded on a judgment lost its priority if not presented to the administrator within one year after the grant of his letters and should have been classed in the last class. *Keith v. Parks*, 31 Ark. 664 (1877) (decision under prior law).

Where confirmation of foreclosure sale was set aside and deed cancelled, but judgment and sale were never set aside and sale was again confirmed after mortgagor's death leaving a deficiency judgment, a claim therefor was one of the second class. *Commonwealth Fed. Sav. & Loan Ass'n v. Thornton*, 205 Ark. 298, 168



S.W.2d 430 (1943) (decision under prior law).

### **Loss of Priority.**

Funeral expenses were payable in preference to items of the second and third class, but the right of priority could be lost by failure to present the claim within six months. *Burns v. Wegman*, 200 Ark. 225, 138 S.W.2d 389 (1940) (decision under prior law).

### **Medical Services.**

The estate of a deceased person in the hands of his administrator was not liable to pay for medical services rendered to the family of a deceased after his death. *Bomford v. Grimes*, 17 Ark. (4 Barber) 567 (1856) (decision under prior law).

### **Premature Assignment.**

An executor or administrator had no power to sell, assign, or dispose of a note or debt due the testator or intestate in payment of one creditor before it was, upon settlement, ascertained how much was due him, to the exclusion of others, and such a sale or transfer vested no title. *Whittaker v. Wright*, 35 Ark. 511 (1880) (decision under prior law).

### **Proceedings in Courts.**

Where a claim had been filed in a probate court, it was not error for a circuit

court to dismiss a counterclaim based on the claim in replevin action against the claimant. *Pettit v. Kilby*, 232 Ark. 993, 342 S.W.2d 93 (1961).

A circuit court's refusal to consider a claim for funeral expenses was without prejudice to the claimant's right to proceed in a probate court. *Pettit v. Kilby*, 232 Ark. 993, 342 S.W.2d 93 (1961).

### **Setoff.**

An administrator had no power to bind the assets in his hands by making an agreement that a probated claim for debt contracted by intestate be set off against debt due estate contracted by claimant when he purchased lands sold by the administrator. *Bishop v. Dillard*, 49 Ark. 285, 5 S.W. 341 (1887) (decision under prior law).

### **Trustee's Indebtedness.**

Upon the death of a trustee, his indebtedness to the trust became a demand against his estate, to be authenticated, allowed, classed, and paid out of the assets of his estate as other demands. *Hill v. State*, 23 Ark. (10 Barber) 604 (1861); *Patterson v. McCann*, 39 Ark. 577 (1882) (decisions under prior law).

**Cited:** *Woolsey v. Nationwide Ins. Co.*, 884 F.2d 381 (8th Cir. Ark. 1989); *Ferguson v. Ferguson*, 2009 Ark. App. 549, 334 S.W.3d 425 (2009).

## **28-50-107. Claims of personal representative.**

A personal representative may establish a claim he or she may have against the estate by filing the claim with the court. Upon a hearing after such notice as it shall direct and if satisfied as to the validity of the claim, the court shall enter an order allowing it.

**History.** Acts 1949, No. 140, § 116; A.S.A. 1947, § 62-2607.

## **CASE NOTES**

### **ANALYSIS**

Allowance Proper.  
Chattel Mortgage.  
Sufficiency of Claim.

### **Allowance Proper.**

Widow's argument that a circuit court erred in allowing a coexecutor of a decedent's estate any fee on his claim against the estate for legal services he provided

from 1981 until the decedent's death failed because the widow did not contest the fact that the coexecutor provided the services reflected in his statement and, while the circuit court started with the premise that the coexecutor was to repay the entire amount of his claim, with interest, because the claim was originally paid without court approval, the circuit court then proceeded to consider the claim anew and determined that \$10,000 was a rea-

sonable fee for the coexecutor's services to the decedent, under § 28-50-105 and this section. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

### **Chattel Mortgage.**

An executor is entitled to proceed against the security on a chattel mortgage held by him against a deceased without having the claim approved. *McKinney v. Caldwell*, 220 Ark. 775, 250 S.W.2d 117 (1952).

### **Sufficiency of Claim.**

Where legatees' petition to reopen administration alleged that administrator was not legally appointed, that she did not qualify for letters testamentary although the will was admitted to probate, that they received no notice of the filing of accounting or hearing thereon, and that the administrator, who claimed all of the proceeds of the estate, had a personal interest which conflicted with her official duties, these facts were sufficient to require the taking of proof. *Holt v. Moody*, 234 Ark. 245, 352 S.W.2d 87 (1961).

## **28-50-108. Claims not due.**

(a) Upon proof of a claim which will become due at some future time, the amount of which is capable of ascertainment, the court shall allow it at the present value of the claim, and payment may be made as in the case of an absolute claim which has been allowed.

(b) However, if the obligation upon which the claim was founded was entered into before July 1, 1949, payment may be made as provided in subsection (a) of this section if the creditor agrees thereto. Otherwise, the court may order the personal representative to retain in his or her hands sufficient funds to satisfy the claim upon maturity, or, if the distributees shall give a bond acceptable to the creditor and approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order the bond to be given in satisfaction of the claim and the estate may be closed.

**History.** Acts 1949, No. 140, § 117; A.S.A. 1947, § 62-2608.

## **CASE NOTES**

### **Alimony Payments.**

Where a husband dies and a divorced wife is entitled to alimony payments for the rest of her life from his estate, a court

does not err in refusing to commute the wife's claim to its present value. *Powell v. Pearson*, 251 Ark. 1107, 476 S.W.2d 802 (1972).

## **28-50-109. Secured claims.**

(a) If a claim is secured, in whole or in part, the security shall be described in the proof of claim.

(b) Written instruments evidencing the security shall be subject to the provisions of § 28-50-103 relative to written instruments upon which a claim is founded. However, if the instrument is recorded in any public record, a duly authenticated copy may be exhibited in lieu of the original.

(c) Subject to the requirements of subsections (a) and (b) of this section, a secured claim may be presented, filed, and allowed in the same manner and subject to the same conditions as an unsecured claim.



(d) An order allowing a secured claim shall identify it as such and shall describe the security, either in detail or by reference to a recorded instrument in which a detailed description may be found.

(e) Payment of a secured claim, after allowance, shall be made only as follows:

(1) If the creditor surrenders all of his or her security to the personal representative, then upon the basis of the full amount thereof, as an unsecured claim;

(2) If the creditor, proceeding with due diligence and in a manner provided by law, liquidates and applies to the payment of his or her claim the proceeds of all or a part of his or her security and surrenders to the personal representative any part not so liquidated and applied, then upon the basis of the balance of the claim remaining unpaid, as an unsecured claim;

(3) If the secured creditor fails to surrender his or her security as provided in subdivision (e)(1) of this section, or to initiate proceedings as provided in subdivision (e)(2) of this section, within sixty (60) days after the expiration of the period for filing claims against the estate, or within such additional time as the court by order may prescribe, or before the filing of a final settlement by the personal representative if it is filed after the expiration of the sixty-day period, he or she shall be deemed to have elected to waive his or her claim against the estate and shall have recourse only against his or her security for the payment of the debt secured thereby;

(4) If the obligation constituting the basis of a secured claim which has been allowed is not due, then the court, after a hearing on a petition filed by an interested person if it is found for the best interest of the estate and not injurious to the creditors, may order an acceleration of maturity of the obligation, but only by consent of the creditor if the obligation was incurred prior to July 1, 1949, and shall determine the present value of the claim as provided in § 28-50-108; and

(5) After allowance of a secured claim based upon an obligation which is due under the provisions of the contract or which has become due by order of the court as authorized in subdivision (e)(4) of this section, if the creditor has not proceeded as authorized in subdivision (e)(1) or (e)(2) of this section, upon petition of an interested person and after due hearing if found for the best interest of the estate or required for the protection of unsecured creditors the court may:

(A) Order the property constituting the security to be sold free of the lien of the secured creditor, subject to the provisions of § 28-51-107;

(B) Order the sale of the decedent's title to or equity of redemption in the property subject to the lien or title held by the secured creditor; or

(C) Order the personal representative to abandon the property as of no value to the estate, without prejudice to dower or homestead rights or to the rights of the distributees. If the property is ordered sold free of the lien, the proceeds shall be applied first to the payment

of costs incident to the sale, and next to the payment of the secured claim, and the balance, if any, shall be paid to the personal representative.

(f) This section shall not apply to contingent claims except as to security given by the decedent to the creditor holding the contingent claim.

**History.** Acts 1949, No. 140, § 118; 1967, No. 287, § 12; A.S.A. 1947, § 62-2609.

### CASE NOTES

#### **Mortgage.**

Where mortgagor dies insolvent, the probate court might have ordered the property sold free of the mortgagee's lien by giving him a preferred claim against the proceeds of the sale, but no attempt was made to follow this procedure. Purchaser was not entitled to take the land

free of the mortgage, as a bona fide purchaser, as the court can offer at a judicial sale only such title as is held by the person or estate whose interest is being sold. *Jones v. Nix*, 232 Ark. 182, 334 S.W.2d 891 (1960).

**Cited:** *Woods v. Barber*, 255 Ark. 927, 504 S.W.2d 355 (1974).

### **28-50-110. Contingent claims.**

(a)(1) Contingent claims which cannot be allowed as absolute debts may, nevertheless, be filed in the court and proved.

(2) If allowed as a contingent claim, the order of allowance shall state the nature of the contingency.

(3) If the claim becomes absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class.

(4) In all other cases, the court may order the personal representative to make distribution of the estate, but to retain in his or her hands sufficient funds to pay the claim if and when the claim becomes absolute. However, for this purpose, the estate shall not be kept open longer than two (2) years after distribution of the remainder of the estate has been made. Prior to or at the expiration of the two-year period, if the claim has not become absolute, the court may order distribution of the funds so retained, after paying any costs and expenses accruing during the period, and the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute. When distribution is so made, the court may require the distributees to give bond with security for the satisfaction of their liability to the contingent creditor.

(b) A contingent claim which becomes absolute six (6) months or more prior to the order of final distribution shall be presented for allowance within six (6) months after becoming absolute. When allowed, the claim shall be deemed an absolute claim as against assets which have not been distributed or distribution of which has not been approved and shall be entitled to the benefit of the provisions of subsection (c) of this section as to assets which do not remain in the hands or subject to the control of the personal representative.



(c) Contingent claims not presented within the time prescribed by § 28-50-101 or subsection (b) of this section shall be barred as against the estate, but, within the time permitted by law for bringing actions thereon, may be enforced against distributees of the estate to the extent of the assets of the estate or the proceeds thereof remaining in the hands of the distributees.

**History.** Acts 1949, No. 140, § 119; A.S.A. 1947, § 62-2610.

### CASE NOTES

#### ANALYSIS

In General.

Time for Filing.

#### In General.

As early as *Walker v. Byers*, 14 Ark. 246 (1853), the Supreme Court held that there was no requirement to file a contingent claim against an estate upon the claim becoming absolute subsequent to the termination of the estate the court held that the creditor could pursue the distributees to the extent of the property received by them. *Hall v. Cole*, 71 Ark. 601, 76 S.W. 1076 (1903), and *Planters' Mut. Ins. Ass'n v. Nelson*, 80 Ark. 103, 96 S.W. 123 (1906), also state the rule that equity will enforce contribution out of lands held by the heirs in an action by a contingent creditor whose claim had matured. Numerous decisions of the Supreme Court hold that a contingent creditor may obtain satisfaction out of assets passing to the distribu-

tee and remaining in his hands, and several cases specifically hold that the property passing into the hands of an innocent purchaser cannot be reached by the creditor (*Wallace v. Swepston*, 74 Ark. 520, 86 S.W. 398 (1905)) (decisions under prior law).

#### Time for Filing.

A contingent claim which does not become absolute until a ruling of a court and when filed within six months after becoming absolute is not barred because not filed within the time required by § 28-50-101. *Whitener v. Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957).

A contingent claim against an estate which becomes absolute six months prior to the final order of distribution must be filed within six months after becoming absolute or it is unenforceable. *Huff v. Bruce*, 261 Ark. 498, 549 S.W.2d 282 (1977).

**Cited:** *Chamberlain v. Crawford*, 236 Ark. 468, 366 S.W.2d 897 (1963).

### 28-50-111. Payment of contingent claims by distributees — Contribution.

(a) If a contingent claim shall have been presented and allowed against an estate and all the assets of the estate including the fund, if any, set apart for the payment thereof shall have been distributed, and the claim shall thereafter become absolute, then the creditor shall have the right to recover thereon in a court having equitable jurisdiction against those distributees whose distributive shares have been increased by reason of the fact that the amount of the claim as finally determined was not paid out prior to final distribution, provided an action therefor shall be commenced within the time permitted by law for bringing an action.

(b) The distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the value of the estate or fund so distributed to him or her.

(c) If more than one (1) distributee is liable to the creditor, he or she shall make all distributees who can be reached by process parties to the action.

(d)(1) By its judgment, the court shall determine the amount of the liability of each of the defendants as between themselves.

(2) However, if any defendant is insolvent or unable to pay his or her proportion, or is beyond the reach of process, the others, to the extent of their respective liabilities, nevertheless shall be liable to the creditor for the whole amount of his or her debt.

(3) If any person liable for the debt fails to pay his or her just proportion to the creditor, he or she shall be liable to indemnify all who, by reason of the failure on his or her part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.

**History.** Acts 1949, No. 140, § 120;  
A.S.A. 1947, § 62-2611.

#### RESEARCH REFERENCES

**Ark. L. Rev. Note,** The Requirement of Notice in Probate Proceedings: Recent Changes in Arkansas Law, 43 Ark. L. Rev. 945.

#### CASE NOTES

##### **Liability Accruing After Settlement.**

Where the contributory liability of a deceased surety was not incurred before his estate was wound up and land in value exceeding the liability was turned over to his sole devisee, judgment against the devisee would be rendered for the amount of the liability, to be charged as a lien upon the land. *Hecht v. Scaggs*, 53 Ark. 291, 13 S.W. 930 (1890) (decision under prior law).

While land descended may, in equity, be charged, in the hands of the heirs, with a debt of the intestate which accrued after the administration upon his estate was closed, the title of a bona fide purchaser acquired before the commencement of the suit would be protected. *Berton v. Anderson*, 56 Ark. 470, 20 S.W. 250 (1892) (decision under prior law).

#### **28-50-112. Compromise of claims.**

When a claim against the estate has been filed or suit thereon is pending, if it appears to be in the best interest of the estate and subject to the court's authorization or approval, the creditor and personal representative may compromise the claim whether due or not due, absolute or contingent, liquidated or unliquidated.

**History.** Acts 1949, No. 140, § 121;  
A.S.A. 1947, § 62-2612.

**Cross References.** Settlement of claims due an estate, § 28-49-104.



## CASE NOTES

## ANALYSIS

Basis of Apportionment.  
Objection to Allowance.  
Partial Acceptance.  
Secured Creditors.

**Basis of Apportionment.**

Assets apportioned on apportionment were to be on the basis of amounts due at time of apportionment. *Jamison v. Adler-Goldman Comm'n Co.*, 59 Ark. 548, 28 S.W. 35 (1894) (decision under prior law).

**Objection to Allowance.**

Where a claim against the estate for the value of services rendered to the testator shortly before his death was approved first by the administrator acting for the estate and then routinely by the probate judge, a pretermitted grandchild, who was held to be the testator's sole heir, had the

burden of proving that the claim should not have been allowed. *Davis v. Hare*, 262 Ark. 818, 561 S.W.2d 321 (1978).

**Partial Acceptance.**

Acceptance of part of an amount apportioned did not estop a creditor to collect the balance. *Jacoway v. Hall*, 67 Ark. 340, 55 S.W. 12 (1900) (decision under prior law).

**Secured Creditors.**

Secured and unsecured claims were paid on the same basis, and after an apportionment order a court could not subsequently compel a creditor to foreclose his mortgage and credit proceeds on his debt in order to reduce his claim and lessen the amount of apportionment due him. *Lofland v. Cowger*, 68 Ark. 274, 57 S.W. 797 (1900) (decision under prior law).

**28-50-113. Payment of claims.**

(a) Upon expiration of six (6) months after the date of the first publication of notice to creditors and the final adjudication of all claims filed against the estate, the personal representative shall proceed to pay the claims allowed against the estate in accordance with the provisions of the Probate Code.

(b) If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he or she deems necessary in connection therewith.

(c)(1) The court, by order, shall direct the application of the assets of the estate to the payment of claims of the several classes in accordance with the order of priority set forth in § 28-50-106.

(2) If there are sufficient assets to pay part, but not all, of the claims of a single class, the assets applicable thereto shall be apportioned between the claims of the class.

(d) Prior to the expiration of the period of six (6) months, the personal representative shall pay such of the claims as the court shall order, and the court may require bond or security to be given by the creditor to refund such part of the payment as may be necessary to make payment in accordance with the provisions of the Probate Code, but all payments made by the personal representative without order of court shall be at his or her own peril.

**History.** Acts 1949, No. 140, § 122; A.S.A. 1947, § 62-2613.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.

## CASE NOTES

## ANALYSIS

Insolvent Estate.

Unprobated Claims.

**Insolvent Estate.**

Because an estate was insolvent, the probate court correctly ordered the estate assets sold to pay claims and expenses of administration. *Acklin v. Riddell*, 42 Ark. App. 230, 856 S.W.2d 322 (1993).

**Unprobated Claims.**

Payment of unprobated claims, without an order of a court, was a waste of the assets, for which creditors with probated claims or the administrator in succession could maintain an action against the administrator or executor. *Edrington v. Jefferson*, 53 Ark. 545, 14 S.W. 99 (1890) (decision under prior law).

**28-50-114. Execution and levies prohibited.**

(a) No execution shall issue upon nor shall any levy be made against any property of the estate under any judgment against a decedent or a personal representative.

(b) However, the provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges, or liens upon real or personal property in an appropriate proceeding.

**History.** Acts 1949, No. 140, § 123; A.S.A. 1947, § 62-2614.

## CASE NOTES

**Applicability.**

Although name on estate accounts suggested a fiduciary character, where accounts were used for business purposes, and other purposes not solely fiduciary,

trial court did not err in finding this section inapplicable. *Adams v. First State Bank*, 300 Ark. 235, 778 S.W.2d 611 (1989).

## CHAPTER 51

## TRANSFERS OF PROPERTY

## SUBCHAPTER.

1. GENERAL PROVISIONS.
2. PERSONAL PROPERTY.
3. REAL PROPERTY INTERESTS.

## RESEARCH REFERENCES

**ALR.** Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust. 6 A.L.R.4th 786.

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., §§ 178-181 and § 243 et seq.

**Ark. L. Rev.** Acts 1949 General Assem-

bly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

**Real Property — Dower — Vesting of Title to Realty in Heirs of Intestate**, 6 Ark. L. Rev. 67.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 295 et seq. and § 785 et seq.



## SUBCHAPTER 1 — GENERAL PROVISIONS

## SECTION.

- 28-51-101. No priority between real and personal property.
- 28-51-102. Grant of power in will.
- 28-51-103. Transfers pursuant to court orders.
- 28-51-104. Sale of a homestead.
- 28-51-105. Terms of sale.

## SECTION.

- 28-51-106. Purchase by personal representative.
- 28-51-107. Purchase by holder of lien.
- 28-51-108. Exchange of property.
- 28-51-109. Validity of proceedings — Appeals.

**Preambles.** Acts 1961, No. 424, contained a preamble which read: "Whereas, due to the changed nature of the economy of Arkansas, it is no longer true that real property constitutes the sound core of the assets of most estates; and in many instances the estate of a decedent now includes investments represented by personal property more desirable than certain types of real property to be preserved for distribution to the heirs at law or beneficiaries of the will of the decedent; and by the provisions of the Probate Code it was the intention of the General Assembly of Arkansas of 1949 to give suitable recognition to this change; but it now appears that apparently conflicting provisions in that Code have given rise to ambiguity and uncertainty of interpretation thereof;

"Now, therefore...."

**Effective Dates.** Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure

that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1983, No. 658, § 3: Mar. 22, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law permits the court to allow the personal representative of an estate to extend credit not exceeding one year and for an amount not exceeding seventy-five percent (75%) of the sale price of real and personal property of the estate; that the limitation currently prescribed on the period and amount of the credit that may be allowed on sales of property of an estate are unduly restrictive and make it difficult if not impossible for the personal representative to obtain the best available price for such property; that this Act is designed to authorize the court to permit extension of credit for a period not exceeding ten (10) years and in an amount equal to ninety percent (90%) of the purchase price of the property and should be given effect immediately in order to enable personal representatives to obtain the best available price for real and personal property of an estate. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

**28-51-101. No priority between real and personal property.**

(a) In determining what property of the estate shall be sold, mortgaged, leased, or exchanged for any purpose provided in § 28-51-103, there shall be no priority as between real and personal property except as provided by the will, if any, or by order of the court or by the provisions of § 28-53-107.

(b) It shall not be necessary that assets of either class, real or personal, other than cash assets, be exhausted before resorting to an asset of the other class for the accomplishment of any purpose enumerated in § 28-51-103.

**History.** Acts 1949, No. 140, § 124; 1961, No. 424, § 2; A.S.A. 1947, § 62-2701.

**CASE NOTES****ANALYSIS**

Applicability.  
Control of Lands.  
Ejectment.  
Limitations.  
Presumption in Land Sales.  
Realty as Asset.  
Recovery of Possession.  
Rights of Heirs.  
Sale of Realty.  
Title to Land.

**Applicability.**

The provision of this section abolishing the priority between real and personal property for payment of the debts of the deceased only applies after it has been determined that the lands are necessary for the payment of debts. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955); *Whitener v. Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957).

**Control of Lands.**

An administrator had no control of the lands of an estate except for the payment of debts. *Stuckey v. Stephens*, 115 Ark. 572, 171 S.W. 908 (1914) (decision under prior law).

**Ejectment.**

An executor could maintain ejectment for a testator's land when necessary to pay debts of the estate. *Etchison v. Dail*, 182 Ark. 350, 31 S.W.2d 426 (1930) (decision under prior law).

**Limitations.**

The charge upon real estate of a decedent for the payment of his debts was held not perpetual, and an application to sell the lands had to be made in a reasonable time, to be determined by the court under the circumstances of the case. A delay of ten years after the grant of administration, without showing any hindrance or proper cause for it, was unreasonable and discharged the lien upon real estate. *Mays v. Rogers*, 37 Ark. 155 (1881); *Stewart v. Smiley*, 46 Ark. 373 (1885) (decisions under prior law).

Under former statute, a delay of seven years was held to be too long. *Brogan v. Brogan*, 63 Ark. 405, 39 S.W. 58 (1897); *Black v. Robinson*, 70 Ark. 185, 68 S.W. 489 (1902) (decisions under prior law).

**Presumption in Land Sales.**

The presumption was that the lands were sold to pay the debts of the intestate duly probated against the estate, and an unlawful sale would not be presumed. *Shell v. Young*, 78 Ark. 479, 95 S.W. 798 (1906) (decision under prior law).

**Realty as Asset.**

Lands were assets in hands of an administrator only when personalty was insufficient to pay debts. *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914) (decision under prior law).

**Recovery of Possession.**

An administrator could not sue to establish title to and recover possession of land



without a showing that the land was needed to pay debts. *Miller v. Watkins*, 169 Ark. 60, 272 S.W. 846 (1925) (decision under prior law).

**Rights of Heirs.**

During pendency of administration, heirs could not recover lands from tenants while debts were unpaid. *Hopson v. Oxford*, 72 Ark. 272, 79 S.W. 1051 (1904) (decision under prior law).

The heirs had the right to the real property of an estate unless and until it was necessary to apply it to the payment of debts of the intestate, and it was not within the province of an administrator to construct or complete buildings at the expense of the real estate for which mechanic's liens could be fixed and enforced against it. *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914) (decision under prior law).

**28-51-102. Grant of power in will.**

When power to sell, mortgage, lease, or exchange property of the estate has been given to a personal representative under the terms of a will, the personal representative may proceed under the power, or, consistent with the provisions of the will, may proceed under the provisions of the Probate Code, as he or she may determine.

**History.** Acts 1949, No. 140, § 126; A.S.A. 1947, § 62-2703.

**Publisher's Notes.** The Probate Code,

**Sale of Realty.**

A creditor was entitled to a sale of real estate to pay debt where the administrator testified at a hearing that he had taken charge of no personal property and had never heard that the decedent had any personal property, as the testimony justified a finding of no personal property in the estate. *Regional Agrl. Credit Corp. v. Polk*, 214 Ark. 285, 215 S.W.2d 523 (1948) (decision under prior law).

**Title to Land.**

This section does not change the rule that the legal title to an intestate's land upon his death descends and vests in his heirs at law, subject to the widow's dower and the payment of debts through his administrator. *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

**Cited:** *Estate of Knott v. Jones*, 14 Ark. App. 271, 687 S.W.2d 529 (1985).

referred to in this section, is codified as set out in the note following § 28-1-101.

**CASE NOTES**

ANALYSIS

Estoppel.  
Nature of Powers.  
Power of Sale.  
Power to Mortgage.

**Estoppel.**

An executor was not estopped by his own void conveyance of land of the estate to sue for its possession, and therefor, the right of the executor, and likewise the right of a cestui que trust, to recover the land was barred after seven years. *Chase v. Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890) (decision under prior law).

**Nature of Powers.**

An executor derived his powers from the will; if it authorized him to sell lands, he could do so without an order of a court,

and, in absence of fraud, his receipt to the purchaser for purchase money was a sufficient discharge. *Ludlow v. Flournoy*, 34 Ark. 451 (1879) (decision under prior law).

**Power of Sale.**

No particular form of words was necessary to create a power of sale, but any words which showed an intention to create such power, or any form of instrument which imposed duties on a trustee that he could not perform without a sale, would have necessarily created a power of sale in the trustee. *Heiseman v. Lowenstein*, 113 Ark. 404, 169 S.W. 224 (1914) (decision under prior law).

**Power to Mortgage.**

Mere power of sale did not include a power to mortgage. *Heiseman v. Lowen-*

stein, 113 Ark. 404, 169 S.W. 224 (1914)  
(decision under prior law).

### **28-51-103. Transfers pursuant to court orders.**

(a) Real or personal property belonging to an estate may be sold, mortgaged, leased, or exchanged under court order when necessary for any of the following purposes:

- (1) For the payment of claims;
- (2) For the payment of a legacy given by the will of the decedent;
- (3) For the preservation or protection of assets of the estate;
- (4) For making distribution of the estate or any part thereof; or
- (5) For any other purpose in the best interest of the estate.

(b) In the event the selection of property of the estate to be sold for any of the purposes enumerated in subsection (a) of this section results in a discrimination against the distributees of the property ordered sold, the court, in the distribution of the estate, shall order contribution to be made between the respective distributees in such manner as to equitably distribute the burden of payment of claims and to avoid an infringement of the substantive rights of the distributees of the estate.

(c) Real or personal property specifically devised or bequeathed shall not be sold for the purpose of the payment of claims if other assets of the estate are available.

(d) An order authorizing a personal representative to sell, mortgage, or lease real or personal property for the payment of obligations of the estate shall not be granted if any of the persons interested in the estate shall execute and file in the court a bond in a sum and with sureties as the court may approve, conditioned as the court may direct, to preserve the rights and equities of all interested persons, within such time as the court shall direct. An action may be maintained on the bond by the personal representative on behalf of any interested person who is prejudiced by breach of any obligation of the bond.

(e)(1) Upon the petition of a creditor or other interested person, the court shall require the personal representative to show cause why he or she should not proceed to sell, mortgage, or lease specific property of the estate for a purpose enumerated in subsection (a) of this section.

(2) If, after a hearing, the court finds it to be advantageous to the estate or necessary for the protection of the rights of interested persons, the court shall order the personal representative to proceed with the sale, mortgage, or lease of the property.

**History.** Acts 1949, No. 140, §§ 127-129; A.S.A. 1947, §§ 62-2704 — 62-2706.



## CASE NOTES

## ANALYSIS

Collateral Attack.  
Equity Jurisdiction.  
Fraud.  
Heirs or Devisees.  
Limitation of Actions.  
Mortgaging Property.  
Partition.  
Payment of Claims.  
—Creditor's Rights.  
Petition.  
Purpose of Sale.  
—Expenses.

**Collateral Attack.**

An order of a probate court directing a sale of land of an estate to pay off a debt secured by a mortgage on land of an estate could not be collaterally attacked because the debt was not probated nor because there were sufficient personal assets in the administrator's hands to pay debts without selling the land. *Long v. Hoffman*, 103 Ark. 574, 148 S.W. 245 (1912) (decision under prior law).

A judgment of a probate court allowing a claim could not be attacked on the ground that the claim was not presented to the administrator before allowance a collateral proceeding upon a petition for the sale of real estate to satisfy the claim. *Watkins v. Reed-Harlan Grocery Co.*, 195 Ark. 905, 115 S.W.2d 277 (1938) (decision under prior law).

**Equity Jurisdiction.**

Sales of lands to pay a decedent's debts could only be ordered by a probate court; equity could not interfere. *Turner v. Rogers*, 49 Ark. 51, 4 S.W. 193 (1886) (decision under prior law).

When lands, which had previously been purchased from the heirs of a decedent, were ordered to be sold by a probate court for the payment of debts, the purchaser could, by a bill in equity, compel the administrator to marshal the assets by first selling other lands and property. *Garibaldi v. Jones*, 48 Ark. 230, 2 S.W. 844 (1887) (decision under prior law).

**Fraud.**

An order to sell land for the payment of debts, procured by fraud, would not be set aside unless the purchaser at the sale

participated in or had notice of the fraud. *Adams v. Thomas*, 44 Ark. 267 (1884) (decision under prior law).

Where an administrator, without compliance with statutes relating to the sale of a decedent's realty for payment of debts, sold realty to an attorney who had prepared the petition for sale and who purchased it for the administrator's wife, and after payment of the widow's share and fee to attorney, the administrator retained the balance as his fee, though no actual fraud appeared to have been contemplated, legal fraud, warranting setting aside the probate court's judgment and the sale resting thereon, was held sufficiently established. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936) (decision under prior law).

**Heirs or Devisees.**

An heir or devisee took an estate subject to the debts of the deceased and could transfer to another no greater right than he himself possessed. *Howell v. Duke*, 40 Ark. 102 (1882) (decision under prior law).

**Limitation of Actions.**

The right of sale accrued upon the discharge of an administrator and was barred in ten years. *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1886), overruled in part, *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973) (decision under prior law).

A delay of 20 years after grant of letters of administration before applying for an order of sale to pay probated claims was not unreasonable when the application was made as soon as the widow died. *Killough v. Hinton*, 54 Ark. 65, 14 S.W. 1092 (1890) (decision under prior law).

Although it is an established rule that the right to sell is lost by "gross laches" or "unreasonable delay," there is no uniform rule for determining what constitutes unreasonable delay or gross negligence. *Roth v. Holland*, 56 Ark. 633, 20 S.W. 521 (1892) (decision under prior law).

Unnecessary delay for a period of over seven years on the part of a creditor in procuring letters of administration to be issued upon the estate of his debtor was such laches as would defeat an application to sell lands of the estate which had been in the possession of the heirs during that

period. *Roth v. Holland*, 56 Ark. 633, 20 S.W. 521 (1892) (decision under prior law).

A delay of more than seven years after the grant of letters of administration before attempting to subject land to payment of debts without other excuse than that the values of real estate were declining was such laches as barred relief even though the administrator, who was one of the heirs, consented to the delay. *Brogan v. Brogan*, 63 Ark. 405, 39 S.W. 58 (1897) (decision under prior law).

A delay of more than seven years with no other excuse than that the lands were subject to overflow was laches which would bar an application to sell interest of infant heir, but would not bar an action as to interest of an heir who was an administrator during such period and was chiefly responsible for the delay. *Black v. Robinson*, 70 Ark. 185, 68 S.W. 489 (1902) (decision under prior law).

Twelve years would not bar the right to sell lands under circumstances excusing the delay. *Mayo v. Mayo*, 79 Ark. 570, 96 S.W. 165 (1906) (decision under prior law).

Neither three years nor seven years would bar the right to sell lands to pay the debts of an estate. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908) (decision under prior law).

### **Mortgaging Property.**

A probate court can authorize the mortgage of property held by an estate for the purpose of refinancing a loan to a federal land bank even though this section does not specifically so state, since a court is entitled to authorize the mortgaging of property "for any purpose in the best interest of the estate." *National Bank v. Young*, 220 Ark. 498, 248 S.W.2d 375 (1952).

The purpose of the legislature in enacting this section was to extend the power of the probate court to authorize mortgaging of property held by an estate rather than to restrict its authority. *National Bank v. Young*, 220 Ark. 498, 248 S.W.2d 375 (1952).

Where an order was entered by the probate court which authorized the executor to borrow funds for purposes which fell within those permissible listed in this section, the mortgaged land became an asset in the hands of the executor and subject to the probate court's jurisdiction under § 28-49-101(b)(1). *Rowland v. Farm*

*Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

Where the court authorized the mortgaging of real estate which was an asset in the hands of the executor, for purposes which were not themselves authorized by statute, it did not serve to oust the court of jurisdiction or to render its order void and subject to collateral attack. *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

### **Partition.**

When a probate court finds that the real estate of a decedent should be sold for any purpose enumerated in this section, the real estate becomes an asset in the hands of the personal representative and is not subject to the jurisdiction of a court of equity for partition. *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).

A probate court's authority to order a sale does not encompass the power to order a partition, which is preferably accomplished by a division in kind. *Gibson v. Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979).

### **Payment of Claims.**

The fact that creditors petitioning the probate court for the sale of a decedent's land for payment of his debts to them were themselves suing the estate for an undivided half of the lands was no ground for the denial of their petition; however, the court could, in its discretion, suspend the proceedings until the litigation as to the title was ended. *Grider v. Apperson & Co.*, 38 Ark. 388 (1882) (decision under prior law).

The allowance of a claim by a probate court, the closing of the administration, and the discharge of the administrator without payment laid the foundation for subjecting a decedent's lands in the possession of his heirs to the payment of a claim. *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1886), overruled in part, *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973) (decision under prior law).

A court properly gave a trustee an opportunity to preserve a trust intact, if reasonably possible, by raising money to pay debts of a decedent's estate. *Gaither v. Hobgood*, 235 Ark. 777, 362 S.W.2d 18 (1962).

### **—Creditor's Rights.**

The death of a decedent fixes a lien upon his lands for the payment of his



debts and they pass to his heirs or devisees charged with such debts; and where a creditor's debt has been duly probated and not paid, or has come into existence too late to be probated or after the administration has been closed, he may in equity subject lands in the hands of the heirs or devisees or their alienees to the payment of the debt. *Hall v. Brewer*, 40 Ark. 433 (1883) (decision under prior law).

The claims of creditors of an estate were paramount to those of distributees, and the latter can assert no claims to assets where they are needed to pay creditors. *State ex rel. McCreary v. Roth*, 47 Ark. 222, 1 S.W. 98 (1886) (decision under prior law).

A purchaser at a void administrator's sale was subrogated to a creditor's rights. *Bond v. Montgomery*, 56 Ark. 563, 20 S.W. 525 (1892); *Harris v. Watson*, 56 Ark. 574, 20 S.W. 529 (1892) (decisions under prior law).

### Petition.

An application had to be made to the court for the county "in which the personal representative was qualified." *Gordon v. Howell*, 35 Ark. 381 (1880) (decision under prior law).

Application for a sale must be made only for certain purposes and by the personal representative, not by the widow. *Gibson v. Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979).

### Purpose of Sale.

The proceeding described in former similar statute applied to sales for the

payment of purchase money as well as for the payment of debts generally. *Montgomery v. Johnson*, 31 Ark. 74 (1876) (decision under prior law).

Trial court's order to authorize the sale of real estate in probate proceedings was supported by an estate administrator's testimony that the administrator spent the administrator's own funds to keep up the property and that the rental income was not sufficient to pay for all of the necessary repairs and expenses. *Rice v. Seals*, 2010 Ark. App. 393, — S.W.3d — (2010).

### —Expenses.

When there were no debts due by a decedent, there could be no sale of lands to pay the expenses of administration had thereon. When application was made to sell lands solely for the expense of administering the estate, it had to be made to appear that the expenses were incurred in the course of administering to pay the debts due personally by the decedent. *Mays v. Rogers*, 52 Ark. 320, 12 S.W. 579 (1889); *Collins v. Paepcke-Leicht Lumber Co.*, 74 Ark. 81, 74 Ark. 82, 84 S.W. 1044 (1905); *Flowers v. Reece*, 92 Ark. 611, 123 S.W. 773 (1909) (decisions under prior law).

Real property of an estate may be sold for purposes other than to pay debts. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979); *Brown v. Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990).

## 28-51-104. Sale of a homestead.

The homestead of a decedent, while it remains the homestead of his or her spouse or minor children, shall not be sold by a personal representative for the payment of debts of the decedent.

**History.** Acts 1949, No. 140, § 125; 1981, No. 714, § 72; A.S.A. 1947, § 62-2702.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Note, Constitutional Law — Equal Protection — Arkansas' Gender-Based Statutes on Dower, Election, Statutory Allowances, and Homestead Are Unconstitutional, *Hess v.*

*Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981); *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372, 18 A.L.R.4th 903 (1981), 4 U. Ark. Little Rock L.J. 361.

## CASE NOTES

## ANALYSIS

Execution by General Creditors.  
Sales Void.

**Execution by General Creditors.**

While Ark. Const., Art. 9, § 6 specifically allows execution against a widow's dower interest in the homestead by her surety in her role of executor when she misuses estate funds, the use of the funds generated by the execution is limited to reimbursement of the surety, and both that section of the constitution and this

section prohibit execution levy by the general creditors of the estate against the homestead. *Northwestern Nat'l Ins. Co. v. Sulcer*, 267 Ark. 31, 588 S.W.2d 442 (1979).

**Sales Void.**

The sale of a homestead during the minority of children to pay debts was void. *Nichols v. Shearon*, 49 Ark. 75, 4 S.W. 167 (1886); *Stayton v. Halpern*, 50 Ark. 329, 7 S.W. 304 (1888); *Burgett v. Apperson*, 52 Ark. 213, 12 S.W. 559 (1889) (decisions under prior law).

**28-51-105. Terms of sale.**

(a) In all sales of real or personal property, the court may authorize credit to be extended by the personal representative for a period not exceeding ten (10) years from the date of the sale and for an amount not exceeding ninety percent (90%) of the purchase price, the payment of which shall be secured by retention of title or reservation of a vendor's lien and in addition may be secured by notes or bonds with sureties approved by the personal representative, subject to the control of the court.

(b) If credit is authorized, the order shall specify the time of payment, the minimum rate of interest on deferred payments, and the manner in which the payments shall be secured.

(c) However, the extension of credit shall not extend or prohibit the closing of the estate if all other pertinent matters before the estate have been resolved to the court's satisfaction.

**History.** Acts 1949, No. 140, § 130; 1983, No. 658, § 1; A.S.A. 1947, § 62-2707.

## RESEARCH REFERENCES

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

**U. Ark. Little Rock L.J.** Survey — Probate, 10 U. Ark. Little Rock L.J. 599.

## CASE NOTES

**Abuse of Discretion.**

A probate court did not abuse its discretion in refusing to set aside a sale of vacant lots by a guardian at \$50.00 an acre offered by the buyer and appraised by persons suggested by the buyer merely

because there had been a recent development in addition. *Hamilton v. Northwest Land Co.*, 223 Ark. 831, 268 S.W.2d 877 (1954).

**Cited:** *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).



**28-51-106. Purchase by personal representative.**

A personal representative shall not purchase property of the estate unless sold at public sale and approved by the court after a hearing on confirmation of the sale, notice of the hearing having been given to the distributees, and then only if the personal representative is a spouse, parent, descendant, brother, or sister of the decedent, or at the time of the sale is, and at the time of the death of the decedent was, the owner of an interest in the property.

**History.** Acts 1949, No. 140, § 131;  
A.S.A. 1947, § 62-2708.

**RESEARCH REFERENCES**

**Ark. L. Rev. Trusts — Who May Purchase at Trustee's Sale,** 6 Ark. L. Rev. 78.

**CASE NOTES****ANALYSIS**

Notice.  
Purchase Not Allowed.

**Notice.**

Decedent's niece was not entitled to reopen administration of decedent's estate on the ground that she did not receive adequate notice of a transfer of assets under § 28-51-108 because the decedent

received actual notice. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

**Purchase Not Allowed.**

Where the property of a decedent was sold by the order of a court, the administrator could not purchase at the sale. *Reeder v. Meredith*, 78 Ark. 111, 93 S.W. 558 (1906); *Eagle v. Terrell*, 95 Ark. 434, 130 S.W. 550 (1910) (decisions under prior law).

**28-51-107. Purchase by holder of lien.**

(a) At any sale of real or personal property upon which there is a mortgage, pledge, or other lien, the holder thereof may become the purchaser and, unless the property is being sold subject to the lien, may apply the amount of his or her lien on the purchase price in the following manner:

(1) If no claim thereon has been filed or allowed, the court, at the hearing on the report of sale and for confirmation of the sale, may examine the validity and enforceability of the lien or charge and the amount due thereunder and secured thereby and may authorize the personal representative to accept the receipt of the purchaser for the amount due thereunder and secured thereby as payment pro tanto.

(2) If the mortgage, pledge, or other lien is a valid claim against the estate and has been allowed, the receipt of the purchaser for the amount due him or her from the proceeds of the sale is a payment pro tanto.

(b) Nothing permitted under the terms of this section shall be deemed to be an allowance of a claim based upon the mortgage, pledge, or other lien.

**History.** Acts 1949, No. 140, § 132;  
A.S.A. 1947, § 62-2709.

### 28-51-108. Exchange of property.

Whenever it shall appear upon the petition of the personal representative or of an interested person to be for the best interest of the estate to exchange any real or personal property of the estate for other property, the court may authorize the exchange upon such terms and conditions as it may direct, which may include the payment or receipt of money by the personal representative. Upon the exchange of personal property or real property, the proceedings for the sale of the respective kinds of property shall be followed as far as applicable.

**History.** Acts 1949, No. 140, § 146;  
A.S.A. 1947, § 62-2723.

### CASE NOTES

#### ANALYSIS

**In General.**  
Exchange for Stock.

#### **In General.**

Decedent's niece was not entitled to reopen administration of decedent's estate on the ground that she did not receive adequate notice, pursuant to § 28-51-106, of a transfer of assets to pay estate taxes because the decedent received actual no-

tice. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006).

#### **Exchange for Stock.**

An order that a deceased partner's interest in a partnership be exchanged for stock in a new corporation was within the authority of a probate court and was binding upon the beneficiaries of the deceased. *Butler v. Newsom*, 256 Ark. 439, 508 S.W.2d 323 (1974).

### 28-51-109. Validity of proceedings — Appeals.

(a)(1) The findings of fact and conclusions of law essential to the validity of a sale, mortgage, lease, exchange, or conveyance of property of an estate by a personal representative, as contained in an order authorizing the sale or other disposition, or in an order confirming the sale or other disposition of property, shall not be subject to collateral attack.

(2) However, on appeal from an order of confirmation, the party appealing may have appellate review not only of the order of confirmation, but also the original order authorizing the sale, mortgage, lease, exchange, or conveyance, although the time as otherwise provided for appeal from the order has elapsed.

(b) Sales or conveyances of property by a personal representative by proceedings not in substantial compliance with the provisions of the Probate Code shall be void.

**History.** Acts 1949, No. 140, § 133;  
A.S.A. 1947, § 62-2710.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.



## CASE NOTES

## ANALYSIS

In General.  
Applicability.  
Foreign Guardian.  
Fraud.  
Guardians' Sale.  
Insane Adults.  
Jurisdiction.  
Minor's Homestead.  
Private Sales.  
Required Recitals.  
Sale of Minors' Lands.  
Void Sales.

**In General.**

The probate court was held to be a court of superior jurisdiction, and when acting within its jurisdictional rights, its judgments were not open to collateral attack if they contained the proper recitals and were not procured by fraud. *Levinson v. Treadway*, 190 Ark. 201, 78 S.W.2d 59 (1935) (decision under prior law).

**Applicability.**

As to past sales, former statute was sustained as a statute of limitations, and as to future sales, it was valid as prescribing the recital of facts which were essential to confer jurisdiction on a probate court to make such a sale impervious to attack on account of omission of other requirements which were not jurisdictional. *Day v. Johnston*, 158 Ark. 478, 250 S.W. 532 (1923) (decision under prior law).

**Foreign Guardian.**

A sale in this state was void where the appointment of a foreign guardian was not legally made. *Landreth v. Henson*, 116 Ark. 361, 173 S.W. 427 (1915) (decision under prior law).

**Fraud.**

Where an administrator, without compliance with statutes relating to sale of a decedent's realty for payment of debts, sold realty to an attorney who had prepared the petition for sale and who purchased it for the administrator's wife, and after payment of the widow's share and fee to attorney, the administrator retained the balance as his fee, though no actual fraud appeared to have been contemplated, legal fraud warranting setting aside the probate court's judgment and

the sale resting thereon was sufficiently established. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936) (decision under prior law).

**Guardians' Sale.**

A guardian's sale of a ward's land was not invalid because the guardian failed to account for the proceeds of the sale or because part of the purchase money was paid by crediting thereon a debt for supplies furnished for the benefit of the ward. *Harper v. Smith*, 89 Ark. 284, 116 S.W. 674 (1909) (decision under prior law).

A guardian's deed executed under an order of a probate court to a minor's land was void where it conceded that the land was sold for less than the appraised value. *Mobbs v. Millard*, 106 Ark. 563, 153 S.W. 821 (1913) (decision under prior law).

A sale of land of a nonresident minor made by a guardian without notice or appraisal was voidable, though it was approved by the probate court. *Ingraham v. Baum*, 136 Ark. 101, 206 S.W. 67 (1918) (decision under prior law).

A guardian's sale of the land of minors was void where one tract of land was described in the application and the order of sale and another tract was described in the appraisal and sold, although the report of the sale was confirmed by the court. *Jones v. McDaniel*, 137 Ark. 1, 203 S.W. 693 (1918) (decision under prior law).

**Insane Adults.**

An order of a probate court directing the sale of an insane adult's interest in a certain lot, meeting the requirements of former statute, was impervious to a collateral attack, in the absence of fraud or duress. *Tuchfeld v. Hamilton*, 203 Ark. 428, 156 S.W.2d 887 (1941) (decision under prior law).

**Jurisdiction.**

Where a probate court ordered the sale of decedent's lands, but the order did not recite the necessity thereof, it would be presumed that the petition which formed the basis of the court's order, and the evidence adduced to support the petition, showed every fact which was essential to give the court jurisdiction to make the order of sale. But the rule was different where the judgment of the probate court was rendered in a proceeding not in ac-

cord with its statutory jurisdiction or according to the course of the common law, but concerning a subject-matter the jurisdiction of which was conferred by special statutes. *Kulbeth v. Drew County Timber Co.*, 125 Ark. 291, 188 S.W. 810 (1916) (decision under prior law).

### Minor's Homestead.

In proceedings by a guardian to sell the homestead of her wards, the omission of an order of sale to show that there were no debts due and unpaid by their deceased parents at the time of the sale was cured by former statute. *Collins v. Harris*, 167 Ark. 372, 267 S.W. 781 (1925) (decision under prior law).

The legislature could not cure a sale of a minor's homestead to pay debts of a deceased. *Hart v. Wimberly*, 173 Ark. 1083, 296 S.W. 39 (1927) (decision under prior law).

The sale of a minor's homestead to pay the debts of a decedent being void as not within the jurisdiction of a probate court was not cured by former statute. *Hart v. Wimberly*, 173 Ark. 1083, 296 S.W. 39 (1927) (decision under prior law).

Former statute was held not to validate a void guardian's sale of a minor's homestead where a probate court judgment did not contain a recital that the sale was conducted according to law and that the facts set forth in the petition entitled the guardian to make the sale. *Dodd v. Hopper*, 182 Ark. 24, 30 S.W.2d 837 (1930) (decision under prior law).

The failure in a guardian's petition for the sale of minor's land to allege that it was not the homestead of the minors was a mere irregularity which would be cured under the provisions of former statute. *Jordan v. Midland Savs. & Loan Co.*, 193 Ark. 313, 99 S.W.2d 260 (1936) (decision under prior law).

### Private Sales.

A private sale made by an administrator without the authority of the court should not have been confirmed. *Gibbs v.*

*Singfield*, 115 Ark. 385, 171 S.W. 144 (1914) (decision under prior law).

Judgments of the probate court were impervious to collateral attack if they contained the jurisdictional recitals which the general assembly had determined were essential to a valid sale against collateral attack, and private sales made under orders of the court containing jurisdictional recitals of statutory requirements of a valid sale were not void when confirmed and were subject to attack only on direct appeal. *Day v. Johnston*, 158 Ark. 478, 250 S.W. 532 (1923); *Fisher v. Cowan*, 205 Ark. 722, 170 S.W.2d 603 (1943) (decisions under prior law).

### Required Recitals.

Former statute was not applicable to probate sales where order did not contain the required recital. *Watson v. Lester*, 182 Ark. 386, 31 S.W.2d 955 (1930) (decision under prior law).

A probate court's judgment confirming assignment of an interest in insurance policy, though not containing the recitals required by former statute, was erroneously quashed by circuit court upon the petition of an insurance company having no interest in the estate and disclaiming liability. *Golightly v. New York Life Ins. Co.*, 196 Ark. 1024, 120 S.W.2d 697 (1938) (decision under prior law).

### Sale of Minors' Lands.

Notwithstanding that a probate court had confirmed the sale of a minor's land, the court could, on appeal, inquire whether the provisions of a statute concerning probate sales had been substantially complied with. *Simmons v. A.C. Carter & Co.*, 125 Ark. 547, 189 S.W. 176 (1916) (decision under prior law).

### Void Sales.

Former statute did not mean that defects in the allowance of claims against an estate would avoid a sale of real estate. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908) (decision under prior law).

**Cited:** *Reichenbach v. Kizer*, 174 B.R. 997 (Bankr. E.D. Ark 1994).

## SUBCHAPTER 2 — PERSONAL PROPERTY

### SECTION.

28-51-201. Sale, mortgage, lease, or exchange.

28-51-202. Sale of perishable property.

### SECTION.

28-51-203. Sale, mortgage, or lease of real and personal property as a unit.



**28-51-201. Sale, mortgage, lease, or exchange.**

(a) The petition of a personal representative for authority to sell, mortgage, lease, or exchange personal property of an estate shall be heard without notice, or upon such notice as the court may direct.

(b) The court, if satisfied as to the necessity or desirability of the action, may order the personal representative to proceed with the sale or other disposition at public or private sale and upon terms and conditions as by the court may be specifically directed.

(c) The court shall prescribe safeguards to assure that the sale, mortgage, lease, or exchange is for an adequate consideration and for the best interest of the estate.

(d) The court, in its discretion, may require confirmation of any sale or other disposition of personal property.

**History.** Acts 1949, No. 140, § 134;  
A.S.A. 1947, § 62-2711.

**CASE NOTES****ANALYSIS**

Assignment Without Court Order.  
Choice of Law.  
Liability for Loss.  
Payment of Notes.

**Assignment Without Court Order.**

The assignment by an administrator of a judgment belonging to the intestate, made privately and without an order of a court, was void. *Winningham v. Holloway*, 51 Ark. 385, 11 S.W. 579 (1889) (decision under prior law).

**Choice of Law.**

To the extent that *Francis v. Turner*, 188 Ark. 158, 67 S.W.2d 211 (1933), stands for the proposition that the marital property law of the situs as opposed to the domicile applies to movable personal property, it is

overruled. *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991).

**Liability for Loss.**

An administrator sold chattels on a credit, under reservation of title, at his own peril, and he was responsible for loss by his failure to comply with the statutes. *Pierce v. Whipple*, 123 Ark. 132, 184 S.W. 837 (1916) (decision under prior law).

**Payment of Notes.**

An executor or administrator to whom notes were executed for personal property and rent of land of a deceased held them in a fiduciary capacity and had no power, by assignment, to appropriate them to the payment of one creditor to exclusion of others. *Payne, Huntington & Co. v. Flournoy*, 29 Ark. 500 (1874) (decision under prior law).

**28-51-202. Sale of perishable property.**

Perishable personal property may be sold by the personal representative without an order of the court. However, the personal representative shall be responsible for the actual value of the property unless he or she shall promptly file a report of the sale and obtain the court's approval.

**History.** Acts 1949, No. 140, § 135;  
A.S.A. 1947, § 62-2712.

**28-51-203. Sale, mortgage, or lease of real and personal property as a unit.**

Whenever in the discretion of the court it is for the best interest of the estate, real and personal property of the estate may be sold, mortgaged, or leased as a unit, but the provisions of the Probate Code with respect to the sale, mortgage, or lease of real property shall apply.

**History.** Acts 1949, No. 140, § 136; referred to in this section, is codified as set out in the note following § 28-1-101.  
A.S.A. 1947, § 62-2713.

**Publisher's Notes.** The Probate Code,

**SUBCHAPTER 3 — REAL PROPERTY INTERESTS****SECTION.**

- 28-51-301. Sale, mortgage, or lease.  
28-51-302. Appraisal.  
28-51-303. Order for sale, mortgage, or lease.  
28-51-304. Sales at public auction.  
28-51-305. Report and confirmation.

**SECTION.**

- 28-51-306. Execution of conveyance — Recordation.  
28-51-307. Expenses of sale.  
28-51-308. Platting and dedication.  
28-51-309. Waiver of landlord's lien.

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**Cross References.** Life interests and remainders, determination of present value, § 18-2-101 et seq.

Publication of notice, § 16-3-101 et seq.

**Effective Dates.** Acts 1951, No. 255, § 15: Mar. 19, 1951. Emergency clause provided: "The General Assembly has ascertained that there is a likelihood of misconstruction of certain provisions of the Probate Code, and that an urgent need exists for clarification thereof and certain additions thereto in order that the

law relating to proceedings in probate may be construed and administered in a uniform manner throughout the State, in accordance with the legislative intent; for the accomplishment of which purposes this Act is adopted. An emergency is therefore declared to exist, and this Act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage and approval."

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**28-51-301. Sale, mortgage, or lease.**

(a)(1) Upon petition of a personal representative, the court having jurisdiction of the administration of the estate may order the sale, mortgage, or lease of real property of the estate, or timber thereon located, or oil, gas, or other minerals or mineral rights or interests appertaining thereto, or any part of or interest in the property, wherever situated in this state.

(2) The court may authorize the execution of any contract relating to, or conveyance or transfer of, any such property, right, or interest, containing such customary or desirable provisions with reference thereto, as the court shall find to be for the best interest of the estate.

(b) The petition shall set forth the reasons for the application and describe the property or right or interest involved and the terms of the



contract, conveyance, or transfer for which authority is sought and shall include a description of the bond of the personal representative and a statement of the facts essential to determine its sufficiency.

(c) Upon the filing of the petition, the court shall fix the time and place for the hearing. Notice of the hearing stating the nature of the application shall be given to such interested persons as the court may direct in the manner provided in § 28-1-112, unless the value of the interest to be sold, mortgaged, or leased is not more than ten thousand dollars (\$10,000), in which case the court, at its discretion, may hear the petition without notice.

(d) At the hearing and upon satisfactory proof, the court may order the sale, mortgage, or lease of the property described or any part thereof or right or interest therein.

(e) At the discretion of the court, real property encumbered by a lien may be ordered sold subject to the lien.

**History.** Acts 1949, No. 140, § 137; A.S.A. 1947, § 62-2714; Acts 2003, No. 1951, No. 255, § 11; 1967, No. 287, § 13; 177, § 3.

## RESEARCH REFERENCES

**Ark. L. Rev. Probate Code Amendments,** 5 Ark. L. Rev. 377.

**Notices Under the Probate Code,** 8 Ark. L. Rev. 324.

## CASE NOTES

### ANALYSIS

Authority to Sell.

Extent of Representative's Interest.

Irregular Proceedings.

Jurisdiction.

Parties to Proceedings.

Purchase by Appraiser.

Realty as Asset.

Widow's Dower.

### Authority to Sell.

An administrator had no authority to sell real estate except as provided by statute. *Burgauer v. Laird*, 26 Ark. 256 (1870) (decision under prior law).

### Extent of Representative's Interest.

The administrator of an estate had no interest in the lands of an intestate and no control over them except for the benefit of creditors and heirs and under the direction of the court. *Kiernan v. Blackwell*, 27 Ark. 235 (1871) (decision under prior law).

### Irregular Proceedings.

A sale of the real estate of a deceased person made under an order of a court conveyed legal title though the proceed-

ings may have been irregular, where the court had jurisdiction of the subject-matter. *Bennett v. Owen*, 13 Ark. (8 English) 177 (1852) (decision under prior law).

### Jurisdiction.

With a petition of an administrator for the sale of real estate under this section for the purpose of making distribution pending in the probate court, the chancery court had no jurisdiction to order a sale in a partition action filed by one of the heirs. *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).

### Parties to Proceedings.

Where an application was made to a court by an administrator for an order to sell real estate, any person interested in the subject-matter could, on a proper showing to the court, make himself a party to the proceeding and appeal therefrom. *Ex parte Marr*, 12 Ark. (7 English) 84 (1851) (decision under prior law).

On petition to probate court to set aside order authorizing sale of decedent's land, where petitioners were not heirs or creditors, where their petition did not assert any claim against the estate or declare

any interest in the estate's property, and where they did not indicate any entitlement to proceeds which might be distributed by the estate, but in fact were persons against whom the estate had sought relief, the petitioners were not interested persons as defined by § 28-1-102(a)(11) and had no standing to question the issuance of the court's order. *White v. Welsh*, 323 Ark. 479, 915 S.W.2d 274 (1996).

#### **Purchase by Appraiser.**

Where appraised estate lands were offered at a public sale, but there were no bidders and the court ordered the property sold a year later under the provisions of former statute free of appraisal, an appraiser named in the original order of sale would be a qualified purchaser at the second sale, as his appraisal would have no effect or bearing thereon. *Norwood v. Heaslett*, 218 Ark. 286, 235 S.W.2d 955 (1951) (decision under prior law).

#### **Realty as Asset.**

Under § 28-49-101, real property is an asset in the hands of an administrator

only when the court finds that it should be sold, mortgaged, leased, or exchanged for purposes stated in § 28-51-103. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

#### **Widow's Dower.**

Real estate vests in the heirs of a decedent, subject to a widow's dower and to sale for the payment of debts, the preservation or protection of the assets of an estate, the distribution of the estate, or any other purpose in the best interest of the estate; the sale, however, is not necessarily free of the widow's dower, and such a sale is not void for want of jurisdiction, but is simply inoperative as far as the widow's dower is concerned. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

**Cited:** *Cranna v. Long*, 225 Ark. 153, 279 S.W.2d 828 (1955).

### **28-51-302. Appraisal.**

(a)(1) Before a personal representative shall sell real property, he or she shall have it appraised by three (3) disinterested persons, selected by him or her, unless appointed by the court, who are well informed concerning the value of real property in the vicinity.

(2) However, unless there is an objection by an heir or beneficiary of the estate, the court may approve the appointment of one (1) appraiser to appraise the real property.

(b) The appraisers shall appraise the real property at its full and fair value and immediately deliver the appraisal certified by them under oath to the personal representative.

(c) The appraisal shall be filed with the clerk prior to the rendition of the order authorizing the sale.

(d) In connection with the hearing on the petition for the order of sale, or prior to the hearing, upon proper notice, the court, upon evidence heard, may approve, modify, or reject the appraisal.

**History.** Acts 1949, No. 140, § 139; A.S.A. 1947, § 62-2716; Acts 1995, No. 406, § 1.



## CASE NOTES

## ANALYSIS

Collateral Attack.  
Confirmation of Sale.  
Sale by Appraiser.

**Collateral Attack.**

A sale on second offering in less than 12 months could not be attacked collaterally where the land sold for two-thirds of its appraised value. *Long v. Hoffman*, 103 Ark. 574, 148 S.W. 245 (1912) (decision under prior law).

Failure of administrator to have an appraisement made did not render the sale void when attacked on that ground in a collateral proceeding. *Fisher v. Cowan*, 205 Ark. 722, 170 S.W.2d 603 (1943) (decision under prior law).

**Confirmation of Sale.**

The failure of an administrator to have land appraised before selling it did not render a sale void if it was confirmed by the court. *Bell v. Green*, 38 Ark. 78 (1881) (decision under prior law).

A probate sale of real estate for the payment of debts was held to be a judicial sale and passed no title till confirmed, and confirmation had to be proved, it could not be presumed. *Apel v. Kelsey*, 47 Ark. 413, 2 S.W. 102 (1886) (decision under prior law).

The recital in an order of a probate court approving a sale that the real estate had been duly appraised by "three disinterested capable persons" amounted to a finding that appraisers were qualified under the requirements of former statute. *Fisher v. Cowan*, 205 Ark. 722, 170 S.W.2d 603 (1943) (decision under prior law).

**Sale by Appraiser.**

A sale by an appraiser was voidable even after confirmation at the instance of the heirs. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908) (decision under prior law).

**Cited:** *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968); *Harper v. Cannon*, 2009 Ark. App. 785, — S.W.3d — (2009); *Rice v. Seals*, 2010 Ark. App. 393, — S.W.3d — (2010).

**28-51-303. Order for sale, mortgage, or lease.**

(a) The order for sale, mortgage, or lease shall describe the property to be sold, mortgaged, or leased and may designate the sequence in which the several parcels shall be sold, mortgaged, or leased.

(b)(1) The order shall contain appropriate provisions with respect to the bond of the personal representative and shall direct whether the property shall be sold at private sale or public auction, and if the latter, the place or places of sale.

(2)(A) If the sale is to be at public auction, the property shall be sold for not less than three-fourths ( $\frac{3}{4}$ ) of its appraised value.

(B) A private sale shall be for not less than the appraised value thereof.

(3) The order shall direct whether the sale shall be for cash or for cash and deferred payments and the terms on which such deferred payments are to be made.

(c) If real property is to be mortgaged, the order shall fix the maximum amount of principal debt which may be secured, the maximum rate of interest which the debt may bear, and the earliest and latest date of maturity and shall direct the purpose for which the proceeds shall be used.

(d) Except in the case of an oil, gas, or other mineral lease, real property of an estate may not be leased by a personal representative for a term exceeding three (3) years. The order authorizing the lease shall specify the maximum term thereof.

(e) In appropriate cases the order shall specify restrictions, reservations, terms, and conditions under which the property is to be sold, mortgaged, or leased.

(f) An order for sale, mortgage, or lease shall remain in force until terminated by the court, but no sale shall be made after six (6) months from the date of the order unless the real property shall have been reappraised under order of the court within thirty (30) days preceding the sale.

**History.** Acts 1949, No. 140, § 140; 1951, No. 255, § 11a; A.S.A. 1947, § 62-2717.

## RESEARCH REFERENCES

**Ark. L. Rev.** Probate Code Amendments, 5 Ark. L. Rev. 377.

## CASE NOTES

### ANALYSIS

Close of Administration.  
Compliance Required.  
Description of Lands.  
Discretion of Court.  
Failure to Give Notice.  
Jurisdiction.  
Mortgage of Property.  
New Order Not Required.  
Presumption of Regularity.  
Private Sale.  
Sufficiency of Petition.  
Validity of Sale.

### Close of Administration.

A conveyance of land by an administrator pursuant to an order by him obtained after his discharge was invalid, and confirmation after the administration was closed would not have added anything to it. *Bender v. Bean*, 52 Ark. 132, 12 S.W. 180 (1889), modified, 52 Ark. 146, 12 S.W. 241 (1889) (decision under prior law).

A probate court could make no order for the sale of land after an order settling an estate and closing the administration had been made, without first setting the order aside. *Abramson v. Rogers*, 97 Ark. 189, 133 S.W. 836 (1911) (decision under prior law).

### Compliance Required.

Probate sales could be made only in the manner and for the purpose prescribed by

statute. *Livingston v. Cochran*, 33 Ark. 294 (1878); *Planters' Mut. Ins. Ass'n v. Harris*, 96 Ark. 222, 131 S.W. 949 (1910) (decisions under prior law).

### Description of Lands.

It was error to order more lands sold than was requested in the petition. *Mays v. Rogers*, 37 Ark. 155 (1881) (decision under prior law).

Where an order of a probate court for the sale of land of an estate was defective, the court was not authorized to amend it at a subsequent term so as to accurately describe the land. *Bouldin v. Jennings*, 92 Ark. 299, 122 S.W. 639 (1909) (decision under prior law).

### Discretion of Court.

The credit in probate sales of land for the payment of debts was not limited to six months, as in other judicial sales, but was left to the sound discretion of the court. *Grider v. Apperson & Co.*, 38 Ark. 388 (1882) (decision under prior law).

Where the property of an insolvent corporation was sold at a judicial sale for approximately 80% of its true value, a minority stockholder did not meet his burden of proof that the public sale price of the property was grossly inadequate and that the chancellor, therefore, abused his discretion in refusing to set aside the sale. *Keirs v. Mt. Comfort Enterprises, Inc.*, 266 Ark. 523, 587 S.W.2d 8 (1979).



**Failure to Give Notice.**

It was erroneous for a probate court to make an order for the sale of lands to pay debts, on the application of an administrator, without the notice required by statute; however, such an order was not void for want of such notice, the proceeding being in rem and the court having jurisdiction of the subject matter. *Rogers v. Wilson*, 13 Ark. (8 English) 507 (1853) (decision under prior law).

The omission to give any notice of an intended application for the sale of land did not affect the jurisdiction of a court to order or confirm a sale. *Apel v. Kelsey*, 47 Ark. 413, 2 S.W. 102 (1886) (decision under prior law).

**Jurisdiction.**

Where record was silent with respect to any fact necessary to give a court jurisdiction, it would be presumed that the court acted within its jurisdiction. *Kulbeth v. Drew County Timber Co.*, 125 Ark. 291, 188 S.W. 810 (1916) (decision under prior law).

Probate courts had jurisdiction to order the sale of real estate to pay debts of an estate in accordance with the jurisdiction conferred by former statute. *Sullivan v. Times Publishing Co.*, 181 Ark. 27, 24 S.W.2d 865 (1930) (decision under prior law).

**Mortgage of Property.**

Where two loans totalled an amount less than that authorized by a probate order, and the order did not preclude the borrowing of a lesser amount initially, the second loan was valid, since subsection (f) provides that an order permitting property to be mortgaged shall remain in force until terminated by the court. *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

**New Order Not Required.**

When a sale failed for the lack of the required bid of the appraised value of the lands, no new order was required condemning the lands. *Burgett v. Apperson*,

52 Ark. 213, 12 S.W. 559 (1889) (decision under prior law).

**Presumption of Regularity.**

An order for sale was presumed regular and was not subject to collateral attack. *Jackson v. Gorman*, 70 Ark. 88, 66 S.W. 346 (1902) (decision under prior law).

An order of a probate court directing the sale of decedent's realty for the payment of debts which did not set out any of the requirements prescribed by statute as preliminary requisites for the sale did not authorize presumption as to regularity of sale in action to set the sale aside on ground of fraud. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936) (decision under prior law).

**Private Sale.**

A private sale of the lands of a decedent, made under an order of a probate court, for the payment of his debts, was not void when confirmed. *Apel v. Kelsey*, 52 Ark. 341, 12 S.W. 703 (1889) (decision under prior law).

**Sufficiency of Petition.**

The validity of an order of a probate court for the sale of lands to pay debts did not depend upon the sufficiency of the petition for sale, for the order was a judgment in rem of a court having original jurisdiction of the subject matter; rather, the judgment had to be corrected on appeal or certiorari when the petition was insufficient. *Adams v. Thomas*, 44 Ark. 267 (1884) (decision under prior law).

**Validity of Sale.**

The sale of real estate under an order made without notice, and otherwise irregular and grossly defective, was not a nullity and would, upon its confirmation, divest the title of the heirs. *Montgomery v. Johnson*, 31 Ark. 74 (1876); *Harper v. Wisner*, 126 Ark. 443, 190 S.W. 569 (1916) (decisions under prior law).

**Cited:** *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968); *Harper v. Cannon*, 2009 Ark. App. 785, — S.W.3d — (2009).

**28-51-304. Sales at public auction.**

(a)(1) In all sales of real property at public auction, the personal representative shall give notice of the sale, particularly describing the property to be sold, and stating the time, place, and terms of sale.

(2) The notice shall be printed one (1) time a week for three (3) consecutive weeks in a newspaper published or having a general circulation in the county in which the property is situated.

(3)(A) If the notice covers property located in more than one (1) county, the notice shall be published as prescribed in this section in each county in which the property is situated.

(B) However, if the notice embraces tracts which are contiguous and lie in more than one (1) county, the notice shall be published in the county in which the greater part in value is situated.

(4) If the property is appraised at not more than five hundred dollars (\$500), in lieu of newspaper publication the personal representative may post the notice in the courthouse of each county in which the property is situated in a conspicuous place near a principal entrance, post the notice on each tract to be sold, and post three (3) additional notices in each county in which the property is situated.

(b) If the tracts to be sold are contiguous and lie in more than one (1) county, the sale may be made in the county in which the greater part of the land, in value, is situated. Otherwise, each tract of land shall be sold in the county in which it is situated.

**History.** Acts 1949, No. 140, § 141;  
A.S.A. 1947, § 62-2718.

#### CASE NOTES

**Cited:** Tsann Kuen Enters. Co. v. Campbell, 355 Ark. 110, 129 S.W.3d 822 (2003).

#### **28-51-305. Report and confirmation.**

(a) Within ten (10) days after making any sale, mortgage, or lease of real property, the personal representative shall make a verified report to the court of his or her proceeding, with proof of publication or posting in case the sale is made at public auction. The report shall state that the personal representative did not directly or indirectly acquire any beneficial interest in the real property, or the lease thereof, or, if he or she acquired any such interest, specific facts showing that it was acquired in conformity with the provisions of the Probate Code.

(b) An interested person may file written objections to the confirmation.

(c)(1)(A) The court shall examine the report and, if satisfied that the sale, mortgage, or lease has been at a price and on terms advantageous to the estate and in all respects made in conformity with law, shall confirm the sale, mortgage, or lease and order the personal representative to execute and deliver to the person entitled a deed, mortgage, lease, or other appropriate instrument.

(B) However, no report shall be confirmed within five (5) days after the filing unless all persons interested in the estate, either in person



or by attorney or guardian, shall consent in writing to the confirmation.

(2) The instrument shall refer to the order of sale, mortgage, or lease by its date and the court by which it was made, shall transfer to the grantee, mortgagee, or lessee all the right, title, and interest of the decedent granted by the instrument, and shall discharge from liability for all debts and obligations incident to the administration of the estate, except encumbrances assumed.

(d) If satisfied that the sale, mortgage, or lease is not advantageous to the estate or has not been made in conformity with law, the court may reject the sale, mortgage, or lease or require a reexecution of the order upon such terms and conditions as it may direct.

(e) However, when the order is for private sale, mortgage, or lease, the court may approve the report and confirm the sale immediately, either by endorsement upon the report of sale, mortgage, or lease or by separate order of confirmation. If approval and confirmation is by endorsement upon the report, the report, with endorsement, shall be recorded.

**History.** Acts 1949, No. 140, § 142; 1967, No. 287, § 14; A.S.A. 1947, § 62-2719.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notices Under the Probate Code, 8 Ark. L. Rev. 324.

## CASE NOTES

### ANALYSIS

Confirmation Necessary.

Fraud.

Purchasers.

—Attorneys.

—Personal Representatives.

—Probate Judges.

Rejection of Public Sale.

### Confirmation Necessary.

A sale not confirmed was void and conferred no title on a purchaser. *Bell v. Green*, 38 Ark. 78 (1881) (decision under prior law).

Since there was no confirmation of the leases or sale of mineral interests in accordance with this section, the sale and leases of the mineral interests were not complete and binding, and their validity could be questioned. *Jackson v. Braden*, 290 Ark. 117, 717 S.W.2d 206 (1986).

### Fraud.

It was fraud for an administrator to be interested in as purchase at his own sale, and equity would set aside the sale. *Mock v. Pleasants*, 34 Ark. 63 (1879) (decision under prior law).

Where an administrator, without compliance with statutes relating to sale of decedent's realty for payment of debts, sold realty to an attorney who had prepared the petition for sale and who purchased it for the administrator's wife, and after payment of widow's share and fee to the attorney, the administrator retained the balance as his fee, though no actual fraud appeared to have been contemplated, legal fraud warranting setting aside the probate court's judgment and the sale resting thereon was sufficiently established. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936) (decision under prior law).

**Purchasers.****—Attorneys.**

An attorney of an administrator, who prepared and filed the petition and obtains an order for the sale of property of a deceased was not allowed to purchase at the sale. *West v. Waddill*, 33 Ark. 575 (1878) (decision under prior law).

**—Personal Representatives.**

An executor or administrator could not purchase any portion of an estate, inasmuch as, in equity, he was held to be a trustee for the heirs, legatees, and creditors. *Wright v. Campbell & Strong*, 27 Ark. 637 (1872) (decision under prior law).

**—Probate Judges.**

A probate judge should not be allowed to purchase lands at a sale ordered by him-

self, and a purchaser of his bid, with knowledge that he was a judge and that he made the order of sale and purchased for his own benefit, was not an innocent purchaser. *Livingston v. Cochran*, 33 Ark. 294 (1878) (decision under prior law).

**Rejection of Public Sale.**

Once a trial judge rejects the report on the public sale of estate land, the status of the parties who had bid for the land can no longer be described as interested parties; at best, their position is that of potential bidders at any future sale, and hence they have no standing to contest a petition on behalf of the heirs of an estate. *Estate of Hodges v. Wilkie*, 14 Ark. App. 297, 688 S.W.2d 307 (1985).

**28-51-306. Execution of conveyance — Recordation.**

(a) Upon the confirmation of any sale, mortgage, or lease in accordance with § 28-51-305, the personal representative shall execute, acknowledge, and deliver a conveyance to the grantee or mortgagee or join the lessee in the execution of a lease according to the order of confirmation.

(b) A certified copy of the order may be recorded with the deed or other instrument in the office of the recorder of the county where the land lies and shall be prima facie evidence of the:

- (1) Due appointment and qualification of the personal representative;
- (2) Correctness of the proceedings; and
- (3) Authority of the personal representative to execute the instrument.

(c) The foregoing provision shall in no way limit the effect of the provisions of § 28-51-109.

**History.** Acts 1949, No. 140, § 143;  
A.S.A. 1947, § 62-2720.

**CASE NOTES****Legal Title.**

Where the lands of a decedent were sold under, and in pursuance of, the judgment of a probate court, the sale vested legal title in the purchaser, and no advantage

could be taken by the heirs of any defect in the deed of conveyance. *Sturdy v. Jacoway*, 19 Ark. (6 Barber) 499 (1858) (decision under prior law).



**28-51-307. Expenses of sale.**

In connection with the sale, mortgage, lease, or exchange of property, the court may authorize the personal representative to pay, out of the proceeds realized or out of the estate, the customary and reasonable auctioneers' and brokers' fees and any necessary expenses for abstracting, title insurance, survey, revenue stamps, and other necessary costs and expenses in connection therewith.

**History.** Acts 1949, No. 140, § 144;  
A.S.A. 1947, § 62-2721.

**28-51-308. Platting and dedication.**

When it is for the best interest of the estate in order to dispose of real property, the court, upon application by the personal representative or other interested person, may authorize the personal representative, either alone or together with other owners, to plat any land belonging to the estate in accordance with the statutes in regard to platting and to dedicate lands in connection therewith.

**History.** Acts 1949, No. 140, § 145;  
A.S.A. 1947, § 62-2722.

**28-51-309. Waiver of landlord's lien.**

In order to enable a lessee, tenant, or sharecropper on lands of the estate to obtain money, advances, or supplies with which to plant, cultivate, or harvest crops growing or to be grown on lands of the estate, a personal representative, upon the authorization of or approval by the court, may waive or subordinate, in whole or in part, a landlord's lien held by the estate.

**History.** Acts 1949, No. 140, § 138;  
A.S.A. 1947, § 62-2715.

CHAPTER 52

ACCOUNTING

SECTION.	SECTION.
28-52-101. Liability of personal representative.	28-52-106. Notice of filing of accounts.
28-52-102. Duty to close estate.	28-52-107. Continuance — Hearing — Objections.
28-52-103. Filing of accounts.	28-52-108. Reference to auditor.
28-52-104. Form of accounts.	28-52-109. Order settling account.
28-52-105. Petitions for settlement and distribution.	28-52-110. Supplemental account.

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**Effective Dates.** Acts 1975, No. 620,  
§ 16: July 1, 1975.

## RESEARCH REFERENCES

**ALR.** Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 A.L.R.4th 708.

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 479 et seq.

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 785 et seq.

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**28-52-101. Liability of personal representative.**

(a) **PROPERTY OF THE ESTATE.** A personal representative shall be liable for and chargeable in his or her accounts with all of the estate of the decedent which, at any time, comes into his or her possession, including income therefrom. However, he or she shall not be:

(1) Accountable for any debts due the decedent or other assets of the estate which, without his or her fault, remain uncollected;

(2) Entitled to any profit by the increase of the estate or value thereof; and

(3) Chargeable for any loss of, damage to, or decrease in value of the estate which occurs without his or her fault.

(b) **PROPERTY NOT A PART OF ESTATE.** A personal representative shall be chargeable in his or her accounts with property not a part of the estate which comes into his or her hands at any time and shall be liable to the persons entitled to that property, if:

(1) The property was received under a duty imposed on him or her by law in the capacity of personal representative; or

(2) He or she has commingled the property with the assets of the estate.

(c) **BREACH OF DUTY.** A personal representative shall be liable and chargeable in his or her accounts for loss resulting from:

(1) Neglect or unreasonable delay in collecting the assets of the estate;

(2) Neglect or unreasonable delay in any sale, mortgage, or lease of the property of the estate which has been ordered by the court;

(3) Neglect or unreasonable delay in paying over money or delivering property of the estate which is in his or her hands;

(4) Embezzlement or commingling of the assets of the estate with other property;

(5) Self dealing;

(6) The wrongful acts or omissions of his or her corepresentative which he or she could have prevented by the exercise of ordinary care; or

(7) Any other neglect or willful act in his or her administration of the estate.

(d) **WHEN NOT PERSONALLY LIABLE.** A personal representative shall not be made liable in his or her individual capacity on account of any action



brought or judgment rendered against him or her in his or her capacity as personal representative, nor shall a personal representative, as such, be made liable on account of a judgment rendered against him or her in his or her fiduciary capacity for an amount more than the assets of the estate which are applicable to the payment of the judgment.

**History.** Acts 1949, No. 140, § 147;  
A.S.A. 1947, § 62-2801.

## CASE NOTES

### ANALYSIS

Effect on Creditors.  
Executor De Son Tort.  
Self Dealing.  
Taking of Proof.

#### Effect on Creditors.

The creditors of an estate were held represented by the administrator and will be concluded by a judgment against him touching the disposition of the estate. *W.R. Moore & Co. v. Sloan*, 71 Ark. 599, 76 S.W. 1058 (1903).

#### Executor De Son Tort.

Under Arkansas' administration system, an executor de son tort was held unknown; it was inconsistent with the policy of the law of administration to hold that any one could make himself the executor of another, and where one intermeddled with the estate of a deceased person, he was responsible to the rightful executor or administrator and not to a creditor. *Barasien v. Odum*, 17 Ark. (4

*Barber*) 122 (1856); *Rust v. Witherington*, 17 Ark. (4 *Barber*) 129 (1856) (decisions under prior law).

#### Self Dealing.

Dual service as personal representative and accountant does not per se create a conflict of interest. *Warren v. Tuminello*, 49 Ark. App. 126, 898 S.W.2d 60 (1995).

#### Taking of Proof.

Where legatees' petition to reopen administration alleged that the administrator was not legally appointed, that she did not qualify for letters testamentary, although the will was admitted to probate, that they received no notice of the filing of accounting or hearing thereon, and that the administrator, who claimed all of the proceeds of the estate, had a personal interest which conflicted with her official duties, these facts were sufficient to require the taking of proof. *Holt v. Moody*, 234 Ark. 245, 352 S.W.2d 87 (1961).

**Cited:** *Alexander v. First Nat'l Bank*, 278 Ark. 406, 646 S.W.2d 684 (1983).

## 28-52-102. Duty to close estate.

(a) A personal representative shall close the estate as promptly as practicable.

(b) Upon petition of an interested person, the court may cite the personal representative to show cause why an estate should not be closed.

**History.** Acts 1949, No. 140, § 148;  
A.S.A. 1947, § 62-2802.

## CASE NOTES

## ANALYSIS

Compliance.

Interested Persons.

**Compliance.**

Where a decedent's will instructed the executors to distribute payments to children leaving a specified children's home until the funds of the estate were depleted or until the estate was closed in accordance with laws regarding number of years an estate could remain open, the provision of the will was in harmony with this section. *Bakos v. Kryder*, 260 Ark. 621, 543 S.W.2d 216 (1976).

**Interested Persons.**

Where a plaintiff promptly objected to the "first and final report" filed by an administrator, there was no estoppel of the plaintiff because his present pleading was not timely filed, as it was the duty of the administrator to close the estate, and plaintiff, as an interested person, could ask that the personal representative be cited to show cause why the estate could not be closed. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**28-52-103. Filing of accounts.**

(a) A personal representative must file with the court a verified account of his or her administration:

- (1) Upon filing a petition for final settlement;
- (2) Upon the revocation of his or her letters;
- (3) Upon his or her application to resign and before his or her resignation is accepted by the court;
- (4) Annually during the period of administration unless the court otherwise directs; and
- (5) At any other time when directed by the court either of its own motion or on the application of an interested person.

(b)(1)(A) If the personal representative dies or becomes incompetent, his or her account may be presented by his or her personal representative or the guardian of his or her estate to, and may be settled by, the court in which the estate of which he or she was personal representative is being administered.

(B) Upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian to render an account of the administration of the estate of the decedent, and the court shall settle the account as in other cases.

(2) A surety on the bond of a personal representative may file an account on behalf of his or her principal when the principal, or his or her personal representative or guardian, if he or she is deceased or incompetent, is in default in the filing of such an account.

(c)(1) If a personal representative fails to present his or her account for settlement when due, it shall be the duty of the clerk to issue a citation in any county in the state where the delinquent personal representative may reside or be found, requiring him or her to present his or her account for settlement within thirty (30) days and to show cause why an attachment shall not be issued against him or her for not having presented his or her account according to law.



(2) The court shall have power to issue attachments and all other process necessary to compel the settlement of accounts by personal representatives, to enforce the judgments and orders of the court, and may assess against the personal representative any costs incurred by reason of his or her neglect of duty.

**History.** Acts 1949, No. 140, §§ 149, 158, 159; A.S.A. 1947, §§ 62-2803, 62-2812, 62-2813.

**Cross References.** Accounting when no known heirs, § 28-13-104.

## CASE NOTES

### ANALYSIS

Accountability for Waste.  
Business Profits.  
Closing of Estate.  
Collections.  
Compliance Required.  
Credit for Expenses.  
Credit for Payments.  
Evidence in General.  
Evidence of Fraud.  
Failure to File Accounts.  
Illegal Expenditures.  
Interested Persons.  
Intervening Administrator.  
Joint Personal Representatives.  
Jurisdiction.  
Payment Less Than Par.  
Recovery of Overcharges.  
Waiver of Requirements.

### Accountability for Waste.

In his settlement, an administrator was not accountable for waste, whatever his liability therefor may have been otherwise. *Reynolds v. Canal & Banking Co.*, 30 Ark. 520 (1875) (decision under prior law).

### Business Profits.

An administrator operating a decedent's business was liable for the profits. *Mayo v. Arkansas Valley Trust Co.*, 132 Ark. 64, 200 S.W. 505 (1917) (decision under prior law).

### Closing of Estate.

Although this section provides that a probate court may compel an administrator to discharge his or her lawful duties, the statute does not provide for the closing of an estate independent of affirmative action by a probate court. *Skaggs v. Culphur*, 57 Ark. App. 50, 941 S.W.2d 443 (1997).

### Collections.

It was the duty of an administrator to report promptly to the probate court all collections made on debts due his intestate; and when he held money so received for a considerable time without reporting it, he should have been charged with interest from the date of collection. *Dyer v. Jacoway*, 50 Ark. 217, 6 S.W. 902 (1888) (decision under prior law).

### Compliance Required.

Section 28-49-110 requires the filing of an inventory in a prescribed form, and this section and § 28-52-104 also set out requirements as to form and time to accounting in mandatory terms; the fact that an administrator files a "first and final report" purporting to furnish full information with respect to everything pertaining to an estate is not compliance in the manner and form required by these sections. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

### Credit for Expenses.

An administrator was not entitled to credit for expenses incurred in regard to a mortgaged farm belonging to an intestate in another state. *Kyle v. Ribelin*, 188 Ark. 264, 65 S.W.2d 46 (1933) (decision under prior law).

### Credit for Payments.

An executor was not entitled to a credit in the annual settlement of his accounts for payments, without an order of the court, to legatees or distributees; such payments were at the peril of the executor and, though valid as between him and the legatee or distributee, were not so as to others having paramount rights in the estate. *McPaxton v. Dickson*, 15 Ark. (2 Barber) 41 (1854) (decision under prior law).

**Evidence in General.**

The former settlement of a deceased administrator was prima facie evidence of amount due by him. *Wilson v. Hinton*, 63 Ark. 145, 38 S.W. 338 (1896) (decision under prior law).

**Evidence of Fraud.**

The failure of an administrator to comply literally with requirements of former statute requiring the filing of vouchers was not sufficient to show fraud in allowing and paying claims. *Walls v. Phillips*, 204 Ark. 365, 162 S.W.2d 59 (1942) (decision under prior law).

**Failure to File Accounts.**

The failure of an executor or administrator to present his account annually for settlement, as prescribed by former similar statute, was a breach of the condition of his bond, for which any person interested in the estate could have maintained an action. *Scarborough v. State*, 24 Ark. (11 Barber) 20 (1862) (decision under prior law).

When an administrator failed to file an account, he should have been cited and required to file one. *Kenyon v. Gregory*, 127 Ark. 525, 192 S.W. 887 (1917) (decision under prior law).

Sanction levied against a lawyer, as personal representative of an estate, was proper under subdivision (c)(2) of this section because he failed to timely produce an accounting as ordered by the probate court. *Hartsfield v. Lescher*, 104 Ark. App. 1, 289 S.W.3d 123 (2008).

**Illegal Expenditures.**

If an executor or administrator claimed credit in his settlement with the probate court for an illegal expenditure, the court should have rejected it, although it could have previously approved the expenditure and authorized him to take credit for it. *Burke v. Coolidge*, 35 Ark. 180 (1879) (decision under prior law).

**Interested Persons.**

Where a plaintiff promptly objected to the "first and final report" filed by an administrator, there was no estoppel of the plaintiff because his present pleading was not timely filed, as it was the duty of the administrator to close the estate, and plaintiff, as an interested person, could ask that the personal representative be cited to show cause why the estate could

not be closed. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**Intervening Administrator.**

Where the final settlement of the original administrator had not been approved, an administrator in succession could have sued the original administrator for an accounting, although an intervening administrator had made a final settlement and had been discharged. *England Loan Co. v. Campbell*, 183 Ark. 49, 35 S.W.2d 75 (1931) (decision under prior law).

**Joint Personal Representatives.**

Where there were two executors, both were equally responsible, and the probate court should have required joint action in its management, allowance, and payment of claims and settlements. *Gocio v. Seamster*, 203 Ark. 937, 160 S.W.2d 194 (1942) (decision under prior law).

**Jurisdiction.**

A probate court acquired jurisdiction of the person of an administrator for settlement of accounts by the service of a citation and an order of attachment upon him. *George v. Elms*, 46 Ark. 260 (1885) (decision under prior law).

**Payment Less Than Par.**

Where an administrator paid the debts of an estate with his own funds, but at less than their face value, he could not charge the estate with the full amount of the debt, since the administrator would not be permitted to profit from his trust. *Trimble v. James*, 40 Ark. 393 (1883); *Wolf v. Banks*, 41 Ark. 104 (1883) (decisions under prior law).

**Recovery of Overcharges.**

In suit by an heir to recover for overcharges against an estate, it was proper to credit against the overcharges the debts of the estate assumed by the administrator which he was not legally bound to assume. *Trimble v. James*, 40 Ark. 393 (1883) (decision under prior law).

**Waiver of Requirements.**

The requirement of former similar statute could be waived by agreement by all the heirs and distributees. *Herndon v. Adkisson*, 208 Ark. 106, 184 S.W.2d 953 (1945) (decision under prior law).

**Cited:** *Roberson v. Hamilton*, 240 Ark. 898, 405 S.W.2d 253 (1966); *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).



**28-52-104. Form of accounts.**

(a) Accounts rendered by a personal representative shall:

- (1) Cover a period distinctly stated;
- (2) Be accompanied by proper vouchers; and
- (3) Contain, separately listed, the following information:

(A) Charges against the personal representative which shall include the property according to the inventory or the balance of it according to the last prior account, all income and property received, and any gains from the sale, conveyance, or other disposition of any property not shown by a prior account;

(B) Credits to which the personal representative is entitled other than payments to distributees;

(C) Assets paid or delivered to distributees;

(D) The balance on hand at the time of settlement and a description of the assets constituting the balance; and

(E) The unpaid liabilities of the estate.

(b) The court may require the account to be made more definite and certain in any respect and may provide for the inspection or verification of the balance of assets on hand.

(c)(1) In all cases in which the personal representative is sole distributee of the estate or in which all of the distributees who are competent and the duly appointed guardians of all incompetent distributees have filed their written waiver of the requirement of the accounting, a formal accounting as required in the preceding portions of this section need not be filed, and it shall be sufficient if the personal representative files a verified statement setting forth the following:

(A) That notice to creditors has been published as required by law and the time for filing claims against the estate has expired;

(B) That there are no unpaid claims;

(C) That all state and federal estate taxes have been paid and a copy of the federal estate tax return which has been filed has been made available to all the distributees ultimately required to bear a portion of the tax, or to their guardian; and

(D) That distribution has been made in full to all persons entitled as distributees of the estate.

(2) However, if any person asserting a claim against the estate or claiming any interest therein which would entitle the person to formal accounting shall file written demand, the personal representative shall comply with the provisions of this section as to formal accounting as in ordinary cases, unless it shall be shown to the court that the alleged claim is invalid or has been paid, or that the person alleging the interest in the estate has in fact no interest therein entitling the person to an accounting.

## CASE NOTES

**Deficient Accounting.**

Where a file folder containing copies of paid bills and receipts was offered after a hearing on an accounting had been completed, and income tax returns, to which the administrator accorded great significance, were not in any way referred to in her "accounting of personal representative" and in such returns deductions for

depreciation on improvements on the property and on items of personal property and other items were shown in a lump sum, the accounting was deficient under the provisions of this section. *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975).

**Cited:** *Roberson v. Hamilton*, 240 Ark. 898, 405 S.W.2d 253 (1966).

**28-52-105. Petitions for settlement and distribution.**

(a) At the time of filing an account, the personal representative shall petition the court to settle and allow his or her account.

(b) If the estate is in a proper condition to be closed, he or she shall also petition the court for an order authorizing him or her to distribute the estate and shall specify in the petition the persons to whom distribution is to be made and the proportions or parts of the estate to which each is entitled, or he or she may petition the court to approve a distribution already made.

**History.** Acts 1949, No. 140, § 151; A.S.A. 1947, § 62-2805.

## CASE NOTES

**Cited:** *Roberson v. Hamilton*, 240 Ark. 898, 405 S.W.2d 253 (1966).

**28-52-106. Notice of filing of accounts.**

During the first week of each month the clerk shall publish, in a newspaper published or having a general circulation in the county, a notice of estates in which accounts have been filed by personal representatives during the preceding month, listing in alphabetical order the names of the estates, with the names of the personal representatives thereof and the respective dates of the filing of the accounts, and calling on interested persons to file objections to the accounts on or before the sixtieth day following the filing of the respective accounts, failing which the persons will be barred forever from excepting to the account.

**History.** Acts 1949, No. 140, § 152; A.S.A. 1947, § 62-2806.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notices Under the Probate Code, 8 Ark. L. Rev. 324.



CASE NOTES

ANALYSIS

Documents.  
Failure to Give Notice.  
Special Notice Not Required.

Documents.

This section would not bar the contestant's argument concerning two certificates of deposit where the record did not reveal that a document, listing the certificates as items not included in the estate, was filed during the probate proceedings. *Swaffar v. Swaffar*, 327 Ark. 235, 938 S.W.2d 552 (1997), cert. denied, 522 U.S. 820, 118 S. Ct. 73 (1997).

Failure to Give Notice.

It was a great irregularity for a probate court to confirm an administrator's ac-

count before the notice required by former statute was given, but the clerk's omission of his duty did not render the account fraudulent. *Greely Burnham Grocery Co. v. Graves*, 43 Ark. 171 (1884) (decision under prior law).

Special Notice Not Required.

All persons interested in settlement of an administrator were charged with notice of its filing, and special notice to those interested was not required. *Jones v. Graham*, 36 Ark. 383 (1880) (decision under prior law).

**Cited:** *Roberson v. Hamilton*, 240 Ark. 898, 405 S.W.2d 253 (1966).

28-52-107. Continuance — Hearing — Objections.

- (a) Every account filed by a personal representative shall be continued without being acted on for a period of sixty (60) days from the date of its filing.
- (b) The court may, and upon motion of an interested person shall, set the hearing on the account for a day certain.
- (c)(1) At any time prior to the hearing on an account of a personal representative, an interested person may file written objections to any item or omission in the account.
- (2) All objections shall be specific and shall indicate the modification desired.

**History.** Acts 1949, No. 140, §§ 153, 154; A.S.A. 1947, §§ 62-2807, 62-2808.

CASE NOTES

ANALYSIS

Allegations of Fraud.  
Appellate Review.  
Approval of Settlement.  
Barred Claims.  
Consideration of Exceptions.  
Correction of Errors.  
Equity Jurisdiction.  
Errors in Calculation.  
Extent of Discharge.  
Fraud in Settlement.  
Illegal Allowances.  
Impeachment of Settlement.  
Interest of Representative in Sale.

Jurisdiction Generally.  
Liability of Sureties.  
Limitation of Actions.  
Objections.  
Persons Entitled to Except.  
Persons Under Disabilities.  
Suppression of Assets.

Allegations of Fraud.

A bill to open settlements of an executor, charging in general terms that he fraudulently omitted to account for all property mentioned in the inventory, was not sufficiently specific; rather, the facts and circumstances had to be stated with distinctness and precision. *Ringgold v. Stone*, 20

Ark. (7 Barber) 526 (1859) (decision under prior law).

### **Appellate Review.**

In a case where several trust beneficiaries filed no objections to an accounting, and a probate court made no ruling on their claims, an appellate court was unable to review any issues they presented on appeal. The claims of the beneficiaries who objected and obtained a ruling on their issues were reviewed. *In re Estates McKnight v. Bank of Am., N.A.*, 372 Ark. 376, 277 S.W.3d 173 (2008).

### **Approval of Settlement.**

The approval by a probate court of an administrator's settlement was conclusive of the accuracy of every item thereof as against creditors who appeared and contested the settlement, unless they showed facts constituting fraud, which have, with no want of diligence on their part, only come to their knowledge since the approval. *Edrington v. Jefferson*, 53 Ark. 545, 14 S.W. 99 (1890) (decision under prior law).

An order of a probate court confirming an administrator's settlement was a judgment binding on all persons interested in an estate and conclusive of all matters embraced in such settlement and within the scope of the proceedings. *Beckett v. Whittington*, 92 Ark. 230, 122 S.W. 633 (1909) (decision under prior law).

The confirmation of a settlement was not conclusive when an appeal was taken. *Stricklin v. Galloway*, 99 Ark. 56, 137 S.W. 804 (1911) (decision under prior law).

### **Barred Claims.**

An allowance in favor of an administrator of a claim barred by limitation would not, unless obtained by fraud, accident, or mistake, be set aside in chancery. *Dyer v. Jacoway*, 50 Ark. 217, 6 S.W. 902 (1888) (decision under prior law).

### **Consideration of Exceptions.**

When exceptions to account of administrator were filed, it was the duty of a court to consider them as long as account-current was before the court for confirmation, and such exceptions did not have to be repeated at each term of court. *Himes v. Sharp*, 123 Ark. 61, 184 S.W. 431 (1916) (decision under prior law).

### **Correction of Errors.**

The adjudication of a probate court in confirmation of settlement of executors

and administrators had to be regarded as a judgment of a court and was binding and conclusive except for fraud, the only mode of correcting mere errors being by appeal. *Ringgold v. Stone*, 20 Ark. (7 Barber) 526 (1859) (decision under prior law).

If a probate court should have erroneously determined exceptions to an executor's settlement, an appeal would have been to the Supreme Court for a trial de novo, but prohibition would not lie. *Gocio v. Seamster*, 203 Ark. 937, 160 S.W.2d 194 (1942) (decision under prior law).

### **Equity Jurisdiction.**

Chancery courts could correct any fraud in the settlements of executors and administrators, and when that was done, if there was a necessity for further proceedings, they should have been had in the probate court. *Reinhardt v. Gartrell*, 33 Ark. 727 (1878) (decision under prior law).

A court of equity had the power to vacate allowances to administrators obtained by fraud, accident, or mistake in their settlements in a probate court, but none to correct mere errors in allowances. *Jones v. Graham*, 36 Ark. 383 (1880); *Greely Burnham Grocery Co. v. Graves*, 43 Ark. 171 (1884) (decisions under prior law).

The jurisdiction of a chancery court was limited to the review of items in the settlement specifically charged to be fraudulent, but this jurisdiction could be enlarged by consent to the parties to include any and all frauds without regard to the specific allegations in the complaint. *McLeod v. Griffis*, 45 Ark. 505 (1885) (decision under prior law).

A probate court had no power to relieve against the fraud of an administrator in buying in the lands of the estate at the sale, as equity alone could grant relief. *Hankins v. Layne*, 48 Ark. 544, 3 S.W. 821 (1887) (decision under prior law).

### **Errors in Calculation.**

A settlement based upon an erroneous calculation, though innocently made, would have been set aside as fraudulent. *Dyer v. Jacoway*, 50 Ark. 217, 6 S.W. 902 (1888) (decision under prior law).

### **Extent of Discharge.**

The discharge of an administrator by a probate court was only for so much of the funds belonging to the estate as was found by his settlement to be in his hands; he



would still have been liable for funds received and not accounted for. *West v. Waddill*, 33 Ark. 575 (1878) (decision under prior law).

### **Fraud in Settlement.**

If an administrator charged himself in settlement with the appraised value of an estate, while the sale bill returned by him showed the amount for which the property sold exceeded its appraised value, or if he applied the money of the estate to the purchase of property in his own name, the court of chancery would open the settlement for fraud. *Osborne v. Graham*, 30 Ark. 66 (1875) (decision under prior law).

Although an administrator's credits might have been fraudulent in law, if there was no actual fraud, there was no relief in equity unless there had been injury also. *Trimble v. James*, 40 Ark. 393 (1883) (decision under prior law).

It was fraud in an administrator to obtain an allowance for himself for the whole of a claim assigned to him when his assignor was indebted to the estate without deducting the debt. *Sorrels v. Trantham*, 48 Ark. 386, 3 S.W. 198, 4 S.W. 281 (1887) (decision under prior law).

### **Illegal Allowances.**

Mere illegal allowances to an administrator, not obtained by misrepresentation or deception upon the court, were not grounds for impeaching or setting aside a settlement in equity; rather, the remedy was by appeal. *Mock v. Pleasants*, 34 Ark. 63 (1879) (decision under prior law).

### **Impeachment of Settlement.**

The final settlement of executors with a probate court was a record which could not be impeached in a collateral proceeding, but only by a direct proceeding in chancery for fraud. *Dooley v. Dooley*, 14 Ark. 122 (1853); *Stone v. Stillwell*, 23 Ark. (10 Barber) 444 (1861) (decisions under prior law).

### **Interest of Representative in Sale.**

The purchase by an administrator of his intestate's lands at the administrator's sale through an agent was fraudulent, though not void, but could be avoided by any one interested. *McGaughey v. Brown*, 46 Ark. 25 (1885) (decision under prior law).

When an administrator became interested in a sale by her as the administrator

of lands to pay debts, after the sale but before confirmation, the sale was voidable at instance of the heirs without showing actual fraud. *Gibson v. Herriott*, 55 Ark. 85, 17 S.W. 589 (1891); *Bland v. Fleeman*, 58 Ark. 84, 23 S.W. 4 (1893) (decisions under prior law).

### **Jurisdiction Generally.**

An order of a probate court overruling an executor's motion to quash exceptions to his settlement, indicating that court would not try questions of disputed title to realty but would continue hearing on executor's report until those questions were determined in the proper forum, did not justify assumption that probate court would exceed its jurisdiction in the matter so as to authorize granting of a writ of prohibition. *Gocio v. Seamster*, 203 Ark. 937, 160 S.W.2d 194 (1942) (decision under prior law).

### **Liability of Sureties.**

Where the account of an administrator showing that nothing was due from him to an estate was confirmed by the probate court, no exceptions having been filed, no liability rested on the sureties on the administrator's bond unless the settlement was impeached in equity. *Crouch v. Edwards*, 52 Ark. 499, 12 S.W. 1070 (1889) (decision under prior law).

### **Limitation of Actions.**

The statute of limitations would commence against an action for the frauds of an administrator from the time of his discharge by the probate court. *McGaughey v. Brown*, 46 Ark. 25 (1885) (decision under prior law).

Fraud would not suspend statute of limitations unless concealed from plaintiff, and then the statute would run from the time of the knowledge of the fraud. *McGaughey v. Brown*, 46 Ark. 25 (1885); *French v. Watson*, 52 Ark. 168, 12 S.W. 328 (1889) (decisions under prior law).

The statute of limitations in an action to vacate a settlement for fraud did not run against a distributee who died in infancy until an administrator was appointed on his estate. *Sorrels v. Trantham*, 48 Ark. 386, 3 S.W. 198, 4 S.W. 281 (1887) (decision under prior law).

### **Objections.**

Because the minor's estate failed to file objections to the bank's accounting with

the probate court, subdivisions (c)(1) and (2) of this section, it could not object to the accounting before the Arkansas Supreme Court; the probate court was not afforded the opportunity to consider any exceptions to the accounting made on the minor's behalf. *Estate of McKnight v. Bank of Am.*, N.A., 372 Ark. 456, 277 S.W.3d 179 (2008).

#### **Persons Entitled to Except.**

Where the administrator of brother's estate did not file report and settlement until death of mother, who was the sole heir, other brothers, having an interest in the mother's estate who has succeeded to the whole estate of her deceased son, were entitled to file exception. *Carter v. Carter*, 193 Ark. 894, 103 S.W.2d 938 (1937) (decision under prior law).

#### **Persons Under Disabilities.**

Persons under disabilities were not bound by their failure to except to administrators' settlements and would be heard after their disabilities were removed to make out a case of fraud to their prejudice. *Riley v. Norman*, 39 Ark. 158 (1882) (decision under prior law).

#### **Suppression of Assets.**

The suppression of assets by an executor or administrator was sufficient ground for surcharging his account after the administration was closed. *Edrington v. Jefferson*, 53 Ark. 545, 14 S.W. 99 (1890) (decision under prior law).

### **28-52-108. Reference to auditor.**

(a) In its discretion, the court may refer an account to an auditor for examination and restatement.

(b) The auditor shall be governed by the law which applies to a master in circuit court for the examination and restatement of an account.

(c) Upon restatement of the account, the auditor shall file it with the court.

(d) The court shall examine the account as restated at a hearing held after notice of the hearing given to the personal representative and other persons, if any, as the court may direct.

(e) After the hearing the court may approve, modify, or disapprove the account as restated.

**History.** Acts 1949, No. 140, § 155; A.S.A. 1947, § 62-2809.

### **28-52-109. Order settling account.**

(a) Upon the approval of the account of a personal representative, the personal representative and his or her sureties, subject to the right of appeal and to the power of the court to vacate its final orders, shall be relieved from liability for the administration of his or her trust during the accounting period, including the investment of the assets of the estate.

(b) The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

**History.** Acts 1949, No. 140, § 156; A.S.A. 1947, § 62-2810.



CASE NOTES

**Cited:** Winters v. Winters, 24 Ark. App. 29, 747 S.W.2d 583 (1988).

28-52-110. Supplemental account.

Receipts and disbursements by the personal representative subsequent to the filing of his or her final accounts shall be reported to the court for approval and may be incorporated in the report of final distribution.

**History.** Acts 1949, No. 140, § 157; A.S.A. 1947, § 62-2811.

CASE NOTES

Continuing Duty.

The duty of a personal representative to account is a continuing one, not subject to the statute of limitations, until such time as he is finally discharged and final distribution approved. Where the proceeding is still pending in a probate court, the original objections and exceptions of a plaintiff

will be considered as continuing as long as the purported account filed has not been approved, and a lapse of time between the filing of the plaintiff's objections and petition to cite him to render an accounting would not be a sufficient basis for estoppel. Price v. Price, 253 Ark. 1124, 491 S.W.2d 793 (1973).

CHAPTER 53

DISTRIBUTION AND DISCHARGE

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. TRANSFERS TO SURVIVING SPOUSES.

RESEARCH REFERENCES

**ALR.** Residuary estate: proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate. 35 A.L.R.4th 788.

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 521 et seq.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 533 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 28-53-101. Determination of heirship.
- 28-53-102. Partial distribution.
- 28-53-103. Order of final distribution — Notice and hearing.
- 28-53-104. Order of final distribution — Contents.
- 28-53-105. Order of final distribution — Conclusiveness.
- 28-53-106. Account not approved.
- 28-53-107. Abatement.

SECTION.

- 28-53-108. Contribution.
- 28-53-109. Determination of advancements.
- 28-53-110. Improper distributions.
- 28-53-111. Setoffs.
- 28-53-112. Interest — Income and increment.
- 28-53-113. Exoneration of encumbered property.
- 28-53-114. Distribution in kind.

## SECTION.

28-53-115. Partition.

28-53-116. Missing or unavailable distributees.

28-53-117. Escheats.

## SECTION.

28-53-118. Discharge of personal representative.

28-53-119. Reopening administration.

**Effective Dates.** Acts 1971, No. 334, § 3: Mar. 22, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that at present there is no provision whereby minors or other persons under a disability can waive notice of a hearing on the filing of a final accounting in an estate; that in many instances persons under some legal disability are properly represented by guard-

ians to protect their interest; and that only by the immediate passage of this Act can this situation be remedied. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

Acts 1975, No. 620, § 16: July 1, 1975.

### RESEARCH REFERENCES

**Ark. L. Rev.** Acts 1949 General Assembly — Act 140 The Probate Code, 3 Ark. L. Rev. 375.

## 28-53-101. Determination of heirship.

(a) **RIGHT TO BRING PROCEEDINGS.** Whenever a person has died leaving in this state property or an interest therein, a person claiming an interest in the property as heir or distributee, or a person claiming through an heir or distributee, or the personal representative of the decedent may file a petition in the circuit court of proper venue for the administration of the decedent's estate to determine the heirs and distributees of the decedent and their respective interests in the estate or the property.

(b) **CONTENTS OF PETITION.** The petition shall state:

(1) The name, age, domicile, and date of death of the decedent;

(2) The names, relationship, if any, to the decedent, age, and residential address of any heirs and distributees, and every person claiming any interest in the property through an heir or distributee as far as is known or can with reasonable diligence be ascertained;

(3) A description of the property with respect to which the determination is sought;

(4) The approximate net value of the estate;

(5) Whether the decedent died testate or intestate and, if testate, a copy of the will and a certificate of probate thereof shall be attached unless probated in the county in which the petition is filed; and

(6) Whether an administration of the estate is pending or has been completed and, if so, in what court.

(c) **PROCEDURE.**



(1)(A) Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to:

(i) All persons known or believed to claim an interest in the property as heir, or through an heir of the decedent, or as a distributee;

(ii) All persons who, at the date of the filing of the petition, may be shown by the records of conveyances of the county in which any real property described in the petition is located to claim an interest therein through the heirs or distributees of the decedent; and

(iii) Any unknown heirs or distributees of the decedent.

(B) The notice shall be given by publication and, in addition, personal notice or notice by registered mail shall be given to every such person whose address is known to the petitioner.

(2) Upon satisfactory proof, the court shall enter an order determining the heirs and distributees.

(d) EFFECT OF ORDER.

(1) The order shall be conclusive upon all parties to the proceeding having or claiming an interest in the property, subject to the right of appeal, and may be set aside only upon such grounds and under such circumstances and in the manner provided by law for setting aside the final judgment or decree of a court of general jurisdiction.

(2) However, upon the petition of any person not personally served with notice who may have or claim an interest in the property involved having filed within three (3) years after the date of the rendition of the order or, in the case of a person under disability or incompetency or being beyond the seas, having filed within three (3) years after such a disability is removed, when the request is for good cause stated in the petition and proved to the satisfaction of the court, the court rendering the order may vacate or modify the order insofar as it affects the interests of the person.

**History.** Acts 1949, No. 140, § 173; 1967, No. 287, § 17; A.S.A. 1947, § 62-2914.

## RESEARCH REFERENCES

**Ark. L. Rev.** Notices Under the Probate Code, 8 Ark. L. Rev. 324.

**Arkansas Law: Decedent's Estates**, 4 U. Ark. Little Rock L.J. 199.

**U. Ark. Little Rock L.J.** Survey of

## CASE NOTES

### ANALYSIS

Evidence of Legitimacy.  
Evidence of Marriage.  
Prior Rights.  
Response.  
Statute of Limitations.

### Evidence of Legitimacy.

In a proceeding by a person claiming to be the illegitimate daughter of a decedent, born at time her mother was legally married, it would be necessary to show that her mother's husband was impotent or that he had no access to her mother;

however, the testimony of the mother could not be used to show such nonaccess. *Thomas v. Barnett*, 228 Ark. 658, 310 S.W.2d 248 (1958).

### **Evidence of Marriage.**

In a proceeding to determine heirship, a half brother was entitled to share estate with nephew, even though no certificate of marriage was introduced showing a second marriage of father of deceased, where there was substantial evidence showing a second marriage actually existed and proof of birth of half brother as result of second marriage by a birth certificate filed prior to the death of deceased. *Butler v. Alldredge*, 219 Ark. 197, 242 S.W.2d 136 (1951).

### **Prior Rights.**

A probate court had no authority under this section to determine the title to realty as between claimants under a will and the alleged sole heir of the deceased whose estate was closed in 1943; rather, the proper jurisdiction for such an action was in the chancery or circuit court. *Adams v. Hart*, 228 Ark. 687, 309 S.W.2d 719 (1958).

### **Response.**

A court did not err in permitting appellees to dictate a response into the record notwithstanding the fact that they had not complied with requirements that objections to the petition be filed within a prescribed time, for this section, when construed with §§ 28-1-110 and 28-1-114 [repealed], permits such a response.

## **28-53-102. Partial distribution.**

### **(a) DELIVERY OF SPECIFIC PROPERTY TO DISTRIBUTEE BEFORE FINAL ORDER.**

(1) Upon petition of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it possession of any specific real or personal property to which he or she is entitled under the terms of the will or by intestacy, provided that other distributees or claimants are not prejudiced thereby.

(2) At any time prior to the order of final distribution, the court may order the return of the property to the personal representative if it is for the best interest of the estate. The court may require the distributee to give security for the return.

### **(b) DISTRIBUTION OF PART OF ESTATE.**

(1) After the expiration of the time for the filing of claims and before final settlement of the accounts of the personal representative, a partial

*Coogler v. Dorn*, 231 Ark. 188, 328 S.W.2d 506 (1959).

Where a petition for determination of heirship under this section was filed in July 1980, and the executor filed his response in September 1980, beyond the 20-day period provided for in ARCP 12, but before the hearing, it was proper for the probate judge to deny petitioner's motion to strike the response, since objections by the defendant are not governed by Rule 12 in probate proceedings and may be made at any time, up to and including the day of the hearing, unless a special order or general rule of the court under § 28-1-110 requires a written objection as a prerequisite to the arguments being heard by the court. *King v. King*, 273 Ark. 55, 616 S.W.2d 483 (1981).

### **Statute of Limitations.**

An action by an heir attacking the determination of heirship is cut off by the three-year statute of limitations. *McBroom v. Clark*, 252 Ark. 372, 480 S.W.2d 947 (1972).

There is no reason for a requirement that a petition for the determination of heirship be filed within five years or any other specified time after the death of the person whose heirs are to be ascertained. *Bryant v. Lemmons*, 269 Ark. 5, 598 S.W.2d 79 (1980).

**Cited:** *Black v. Thompson*, 237 Ark. 304, 372 S.W.2d 593 (1963); *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988).



distribution may be ordered, after notice to such interested persons, if any, as the court may direct.

(2) The partial distribution shall be as conclusive as an order of final distribution with respect to the estate distributed except to the extent that other distributees or claimants are deprived of the fair share or amount which they would otherwise receive on final distribution.

(3) Before a partial distribution is so ordered, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees or claimants who may be prejudiced by any partial distribution.

**History.** Acts 1949, No. 140, § 160;  
A.S.A. 1947, § 62-2901.

## CASE NOTES

### ANALYSIS

Assignment of Rights.  
Claims for Distribution.  
Court Order.  
Death of Legatee.  
Heir Indebted to Estate.  
Jurisdiction.  
Partial Settlements.  
Prior Distribution.

### Assignment of Rights.

A judgment recovered by an administrator belongs to the distributees of the intestate, subject to the payment of debts and the expenses of administration; when they assign it during the administration, their assignee acquires such interest therein as they will be entitled to when the estate is settled and administration discharged. *Winningham v. Holloway*, 51 Ark. 385, 11 S.W. 579 (1889) (decision under prior law).

### Claims for Distribution.

Claims for distribution of personal property had to be made to a probate court, and claims for real property, when not needed for payment of debts, could be asserted by an action at law; equity ordinarily had no jurisdiction. *Oliver v. Vance*, 34 Ark. 564 (1879) (decision under prior law).

### Court Order.

An administrator had no authority to distribute an estate until ordered by the court. *Brackville v. Holt*, 153 Ark. 248, 239 S.W. 1059 (1922) (decision under prior law).

### Death of Legatee.

When a legatee dies after the death of a testator, his personal representative, and not his distributees, were entitled to collect the legacy. *Purcelly v. Carter*, 45 Ark. 299 (1885); *George v. Elms*, 46 Ark. 260 (1885) (decisions under prior law).

### Heir Indebted to Estate.

When the share of an heir in the estate of his intestate had been appropriated to the payment of his individual debt for which the intestate was surety, he was not entitled to participate further in the estate. *Wilson v. Slaughter*, 53 Ark. 137, 13 S.W. 515 (1890) (decision under prior law).

### Jurisdiction.

A probate court had no jurisdiction to determine heirship or the rights of inheritance when there was no petition for distribution of the estate. *Brackville v. Holt*, 153 Ark. 248, 239 S.W. 1059 (1922) (decision under prior law).

### Partial Settlements.

Partial settlements by testamentary trustee approved by chancery court were interlocutory, and not final, orders, and therefore could be modified. *Hardy v. Hardy*, 217 Ark. 296, 230 S.W.2d 6 (1950) (decision under prior law).

### Prior Distribution.

To render the title of a legatee to a specific legacy complete and perfect prior to the time allowed for the settlement of the estate of the testator, the assent of the executor was necessary. *Ross v. Davis*, 17 Ark. (4 Barber) 113 (1856) (decision under prior law).

An executor or administrator could not pay legacies or distributive shares until the time prescribed by statute unless ordered to do so by the probate court, and such order could not be made unless it

appeared that the assets were sufficient to pay all the demands against the estate. *McDearman v. Martin*, 38 Ark. 261 (1881) (decision under prior law).

### 28-53-103. Order of final distribution — Notice and hearing.

(a) Upon the filing of a final account of a personal representative praying for an order of final distribution or for approval of final distribution previously made, the court shall fix a date for hearing, not earlier than sixty (60) days after such a filing.

(b) In addition to the notice required by § 28-52-106, the clerk, by one (1) or more of the methods provided by § 28-1-112 as the court may by rule or specific order direct, shall notify all distributees of the estate, the surviving spouse, if any, of the decedent, all unpaid creditors, the surety of the personal representative, and such other persons, if any, as the court may direct, of the filing of the final account and the date set for hearing thereon.

(c) However, the court may order a final distribution or approve a final distribution previously made immediately upon the filing of the final account when it appears to the court that all parties in interest who are of full age and under no disability have waived the notice and hearing and that the guardians of all parties in interest who are minors or under disability of incompetency have waived the notice and hearing.

**History.** Acts 1949, No. 140, § 161; 1959, No. 190, § 1; 1971, No. 334, § 1; A.S.A. 1947, § 62-2902.

### RESEARCH REFERENCES

**Ark. L. Rev.** Notices Under the Probate Code, 8 Ark. L. Rev. 324.

**U. Ark. Little Rock L.J.** Survey of

Arkansas Law: Decedents' Estates, 6 U. Ark. Little Rock L.J. 139.

### CASE NOTES

#### ANALYSIS

In General.

Creditor's Rights.

Jurisdiction.

Necessity of Notice.

Taking of Proof.

Trial by Jury.

#### In General.

This section contemplates that the distributees of an estate be given such notice of the hearing as the court may direct, to the end that questions pertaining to the distribution may be conclusively settled in

an adversary proceeding. *Collie v. Tucker*, 229 Ark. 606, 317 S.W.2d 137 (1958).

#### Creditor's Rights.

The claims of creditors were paramount to those of distributees, and it was only when the assets were not needed in the course of administration that the rights of the latter could be asserted. *State ex rel. McCreary v. Roth*, 47 Ark. 222, 1 S.W. 98 (1886) (decision under prior law).

#### Jurisdiction.

The probate court where the administration was pending was the proper tribunal to determine who were creditors of the



estate and, when there was a sufficiency of assets, to satisfy their claims without resort to the particular fund desired by the distributees. *State ex rel. McCreary v. Roth*, 47 Ark. 222, 1 S.W. 98 (1886) (decision under prior law).

Probate courts were given original, exclusive jurisdiction to hear and determine many of the matters raised by the exceptions to a report of an executor. *Gocio v. Seamster*, 203 Ark. 937, 160 S.W.2d 194 (1942) (decision under prior law).

#### **Necessity of Notice.**

No order of distribution of an estate could be made until notice of the proceeding had been given to all of the distributees. *Neal v. Robertson*, 55 Ark. 79, 17 S.W. 587 (1891) (decision under prior law).

#### **Taking of Proof.**

Where legatees' petition to reopen administration alleged that the administra-

tor was not legally appointed, that she did not qualify for letters testamentary, although the will was admitted to probate, that they received no notice of the filing of accounting, or hearing thereon, and that the administrator, who claimed all of the proceeds of the estate, had a personal interest which conflicted with her official duties, such facts were sufficient to require the taking of proof. *Holt v. Moody*, 234 Ark. 245, 352 S.W.2d 87 (1961).

#### **Trial by Jury.**

Trial by a jury of exceptions to an account in the probate court was not contemplated by law. *Crow v. Reed*, 38 Ark. 482 (1882) (decision under prior law).

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

### **28-53-104. Order of final distribution — Contents.**

(a) The order authorizing, directing, or approving a final distribution shall state that:

(1) Not less than sixty (60) days have elapsed from the date of the filing of the final account or notice and hearing have been waived;

(2) The notice required by § 28-53-103 has been given or has been waived;

(3) The time for filing claims against the estate has expired;

(4) All claims have been paid, or contain a list of unpaid claims;

(5) There are contingent claims which have been allowed and whether the distributees take subject thereto;

(6) All state and federal inheritance and estate taxes have been paid or provided for; and

(7) The distribution authorized or approved is according to law.

(b) If there has been a determination that there is no liability to the estate by the personal representative or his or her surety and if the order approves a final distribution previously made, the order shall discharge the personal representative and the surety on his or her bond.

**History.** Acts 1949, No. 140, § 161; 1959, No. 190, § 1; A.S.A. 1947, § 62-2902.

### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Decedents' Estates, 6 U. Ark. Little Rock L.J. 139.

## CASE NOTES

## ANALYSIS

Discharge.

No Final Order of Distribution Entered.

**Discharge.**

Distribution previously made or to be made was approved and the executor and his sureties were released and discharged from their trust and any and all liability or accountability thereunder; nothing in the court's statement discharging the executor indicated that the discharge was subject to a lawsuit being filed. *Johnson v. Greene Acres Nursing Home Ass'n*, 364 Ark. 306, 219 S.W.3d 138 (2005).

Circuit court did not err in granting a medical center, doctors, and an insurer summary judgment in an executrix's wrongful death/malpractice action because the executrix had no standing to file a lawsuit on behalf of the estate since the probate court had closed the estate and discharged her; there was substantial compliance with this section, and the order closing the estate was effective, because although that order did not expressly discharge the executrix or approve a final distribution, it authorized her to execute an executrix's deed to convey the decedent's property in accordance with her wishes, and since the heirs had waived the final accounting, there was nothing more for the executrix to do as the personal representative of the estate unless a wrongful-death action was filed

within the period limited by the circuit court. *Prickett v. Hot Spring County Med. Ctr.*, 2010 Ark. App. 282, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 447 (May 12, 2010).

**No Final Order of Distribution Entered.**

Former attorney's appeal from a probate court's order striking the former attorney's response to a motion for modification and declaratory judgment and discovery requests was dismissed with prejudice because (1) the order striking the response was the only issue raised on appeal, (2) the order striking the response was an appealable order, under Ark. R. App. P. Civ. 2(a)(4), (3) the order striking the response was not reviewable under § 28-1-116(d) as being an appealable order entered prior to a final order of distribution, as no final order of distribution meeting the requirements of this section was entered, (4) even if the contested order were viewed as an order of a probate court, rather than an order striking a response, the appeal was still untimely, as the order was appealable at the interlocutory stage, under Ark. R. App. P. Civ. 2(a)(12) and § 28-1-116, and (5) the appeal was not timely filed, under Ark. R. App. P. Civ. 4(a). *Brown v. Wilson (In re Estate of Stinnett)*, 2011 Ark. 278, — S.W.3d — (2011).

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

**28-53-105. Order of final distribution — Conclusiveness.**

(a) The order of final distribution shall be a conclusive determination as to the persons who are the successors in interest to that part of the estate of the decedent passing through the hands of the personal representative and as to the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the order.

(b) The order shall not affect the rights of third parties acquired from or through a distributee, as against the distributee.

**History.** Acts 1949, No. 140, § 161; 1959, No. 190, § 1; A.S.A. 1947, § 62-2902.



## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Decedents' Estates, 6 U. Ark. Little Rock L.J. 139.

## CASE NOTES

## ANALYSIS

Continuing Duty of Personal Representative.

Res Judicata.

**Continuing Duty of Personal Representative.**

The duty of a personal representative to account is a continuing one, not subject to the statute of limitations, until such time as he is finally discharged and final distribution approved. Where the proceeding is still pending in a probate court, the original objections and exceptions of a plaintiff will be considered as continuing as long as the purported account filed has not been approved, and a lapse of time between the filing of the plaintiff's objections and the petition to cite him to render an accounting would not be a sufficient basis for estoppel. *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973).

**Res Judicata.**

A widow's heirs were not bound by a distribution order entered in the estate of her husband under the doctrine of res judicata, for they were not parties to that proceeding nor were they concluded by the principle of virtual representation since it could not be said that the widow fairly represented the same interest as theirs in the uncontested proceeding, the distribution order being that she was the sole beneficiary of her husband's estate, there being no other distributees under the terms of the will regardless of husband stating that by any undisposed of properties husband meant to be distributed to both his heirs and his wife's heirs. *Collie v. Tucker*, 229 Ark. 606, 317 S.W.2d 137 (1958).

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

**28-53-106. Account not approved.**

If the final account is not approved, the court shall enter an order specifying wherein and the extent to which the account is not approved and directing a restatement of the account and such further action, if any, on the part of the personal representative as the court finds to be proper.

**History.** Acts 1949, No. 140, § 161; 1959, No. 190, § 1; A.S.A. 1947, § 62-2902.

**Cross References.** Restatement of account, reference to auditor, § 28-52-108.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Decedents' Estates, 6 U. Ark. Little Rock L.J. 139.

## CASE NOTES

**Cited:** *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979).

**28-53-107. Abatement.**

(a) Except as provided in subsection (c) of this section, shares of the distributees shall abate for the payment of claims, legacies, the family allowances, the shares of pretermitted heirs, or the share of the surviving spouse who is entitled to and elects to take against the will, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Property devised to the residuary devisee;
- (3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee; and
- (4) Property specifically devised.

(b)(1) A general devise charged on any specific property or fund, for purpose of abatement, shall be deemed property specifically devised to the extent of the value of the thing on which it is charged.

(2) Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of the failure or insufficiency.

(c) If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) of this section, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

**History.** Acts 1949, No. 140, § 162;  
A.S.A. 1947, § 62-2903.

**RESEARCH REFERENCES**

**Ark. L. Rev.** The Doctrine of Worthier Title in Arkansas, 21 Ark. L. Rev. 394.

**U. Ark. Little Rock L.J.** Brantley and Effland, Inheritance, The Share of the

Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared, 3 U. Ark. Little Rock L.J. 361.

**CASE NOTES****ANALYSIS**

Administrative Expenses.  
Specific Bequests.  
Specific Devise of Life Estate.

**Administrative Expenses.**

Where testator's will contained no express provisions concerning administrative expenses or claims and there was no express or implied testamentary plan apparent to share expenses pro rata or otherwise, it was proper for the probate judge to apply the abatement provisions under this section. *McDermott v. McAdams*, 273 Ark. 20, 616 S.W.2d 476 (1981).

Where trial court erred in determining that a devise was specific as opposed to residuary, the trial court's order that the estate's expenses should be shared on a pro rata basis by all of the beneficiaries was also an error. *Cleaves v. Parker*, 93 Ark. App. 150, 217 S.W.3d 136 (2005).

**Specific Bequests.**

A probate judge did not err in holding that a paragraph in the will of a testator was a specific, rather than a general, bequest where the paragraph provided: "I bequeath all monies I may possess, my checking account monies, savings account monies, Certificates of Deposits, bonds of



any nature and other evidence of debt such as promissory notes, to my niece, Christania Sewell." *Barnes v. Sewell*, 269 Ark. 1, 598 S.W.2d 77 (1980).

### **Specific Devise of Life Estate.**

Where there was a specific devise of a life estate, a specific devise of the remainders, and a residuary devise, and rents collected, which constituted part of the life

estate, were used to pay claims against the estate, the life tenant was entitled to demand that the residuary devise be first completely abated and that the other recipients of specific devises be required to contribute "according to their respective interests." *Taylor v. Vick*, 251 Ark. 517, 473 S.W.2d 902 (1971).

## **28-53-108. Contribution.**

(a) When real or personal property which has been specifically devised or charged with a legacy shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowances, the shares of pretermitted heirs, or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken so as to accomplish an abatement in accordance with the provisions of § 28-53-107.

(b) The court shall determine, at the time of the hearing on the petition for final distribution, the amounts of the respective contributions and whether the contributions shall be made before distribution or shall constitute a lien on specific property which is distributed.

**History.** Acts 1949, No. 140, § 163; A.S.A. 1947, § 62-2904.

## **CASE NOTES**

### **ANALYSIS**

Specific Bequests.

Specific Devise of Life Estate.

### **Specific Bequests.**

A probate judge did not err in holding that a paragraph in the will of a testator was a specific, rather than a general, bequest, where the paragraph provided: "I bequeath all monies I may possess, my checking account monies, savings account monies, Certificates of Deposits, bonds of any nature and other evidence of debt such as promissory notes, to my niece, Christania Sewell." *Barnes v. Sewell*, 269 Ark. 1, 598 S.W.2d 77 (1980).

### **Specific Devise of Life Estate.**

Where there was a specific devise of a life estate, a specific devise of the remainders, and a residuary devise, and rents collected, which constituted part of the life estate, were used to pay claims against the estate, the life tenant was entitled to demand that the residuary devise be first completely abated and that the other recipients of specific devises be required to contribute "according to their respective interests." *Taylor v. Vick*, 251 Ark. 517, 473 S.W.2d 902 (1971).

## **28-53-109. Determination of advancements.**

(a) All questions of advancements made or alleged to have been made by an intestate to any heir may be heard and determined by the

court at the time of the hearing on the petition for final distribution or at an earlier date if the court so directs.

(b) The amount of every advancement shall be specified in the order of final distribution.

**History.** Acts 1949, No. 140, § 164;  
A.S.A. 1947, § 62-2905.

### **28-53-110. Improper distributions.**

(a) Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitations, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return any property improperly received, which is other than money, and its income since distribution if he or she has the property and to return an amount equal to any money improperly paid with interest at six percent (6%) per annum. If he or she does not have the property, then he or she is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him or her.

(b) An improper distribution or payment shall be deemed to include distribution or payment without deduction of or payment for any federal or state estate, death, or transfer taxes properly apportioned thereto.

(c) Any suit or proceeding to recover property improperly distributed or the value thereof may be instituted in the circuit court in which administration is pending or was had, or in any other court of proper jurisdiction.

(d) Any suit or proceeding to recover property improperly distributed or the value thereof, money improperly paid, and income or interest, as the case may be, shall be barred three (3) years after the decedent's death or two (2) years after the time of distribution or payment, whichever last occurs.

**History.** Acts 1975, No. 620, § 13;  
A.S.A. 1947, § 62-2902.1.

### **CASE NOTES**

#### **Statute of Limitations.**

In an action to have an estate recovered and partitioned for benefit of a widow and child where the sister of the deceased, who had herself appointed the personal representative of the deceased's estate, failed to notify deceased's wife and adopted daughter, who resided in a foreign country, of deceased's death, or of her appointment, failed to list the wife and daughter as heirs on her petition for letters of administration, and failed to notify them when the estate was closed, the sister breached

her duty of trust and was guilty of fraud, and the statute of limitations did not commence to run until the wife was put on notice of her husband's death. *Walters v. Lewis*, 276 Ark. 286, 634 S.W.2d 129 (1982).

Where a complaint sought contribution from a beneficiary in a related case for breach of fiduciary duty, fraud, fraudulent administration of an estate and civil conspiracy, the time limitations in subsection (d) of this section did not apply, despite the fact that liability had arisen from an im-



proper estate distribution. *Heinemann v. Hallum*, 365 Ark. 600, 232 S.W.3d 420 (2006).

**Cited:** *In re Estate of Conover*, 304 Ark. 268, 801 S.W.2d 299 (1990).

### 28-53-111. Setoffs.

When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any real or personal property of the estate to which the distributee is entitled. However, the distributee shall be entitled to the benefit of any defense which would be available to him or her in a direct proceeding for the recovery of the debt.

**History.** Acts 1949, No. 140, § 165; A.S.A. 1947, § 62-2906.

### CASE NOTES

#### Setoffs Inappropriate.

Trial court's decision reducing a surviving spouses dower interest, received pursuant to the terms of §§ 28-11-301 and 28-11-305, for certain claims against the estate under this section was reversed because the claim for a commission was not a debt that the spouse owed to the

estate and the claim based on a note was a contingent claim still subject to unasserted defenses available to the spouse. *Stevens v. Heritage Bank*, 104 Ark. App. 56, 289 S.W.3d 147 (2008).

**Cited:** *Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 35 S.W.3d 315 (2000).

### 28-53-112. Interest — Income and increment.

(a) **INTEREST.** Unless a contrary intent is indicated by will, if the estate is solvent, general legacies shall bear interest at the rate of six percent (6%) per annum, or the then-prevailing legal rate, beginning fifteen (15) months after commencement of administration, but not before that time.

(b) **INCOME AND INCREMENT.** Unless otherwise provided in the will, a specific devise of property shall be construed to include income or increment accruing to the property while in the hands of the personal representative.

(c) **ALLOCATION OF TRUST INCOME.** When property is devised to a trustee upon a trust which separates the beneficial interest in the income and principal of the trust, the income which accrues to the property so devised during the administration of the estate shall be treated as income by the trustee when received by him or her.

**History.** Acts 1949, No. 140, § 166; 1975, No. 620, § 11; A.S.A. 1947, § 62-2907.

## RESEARCH REFERENCES

**Ark. L. Rev.** Some Practical Aspects to Drafting in the Estate Planning Field, 21 Ark. L. Rev. 5.

## CASE NOTES

## ANALYSIS

General Legacies.  
Interest Rate.  
Specific Legacies.

**General Legacies.**

Where the legacy was not tied to a precise source, but was payable out of the estate generally, it constituted a general legacy for the purpose of calculation of interest. *Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997).

**Interest Rate.**

Where there was no proof in the record of a different prevailing rate of interest,

the assessment of an eight percent interest rate by the trial court was improper; the appropriate rate to be applied was six percent as set forth in subsection (a). *Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997).

**Specific Legacies.**

Generally speaking, specific legacies do not bear interest other than the increase which develops from the thing given. *Bransford v. Jones*, 284 Ark. 121, 679 S.W.2d 798 (1984).

**28-53-113. Exoneration of encumbered property.**

As between the distributees, secured debts shall be discharged out of the general assets of the estate, subject to the right of a decedent to provide otherwise by will. However, nothing in this section shall preclude a secured creditor from having recourse to his or her security for satisfaction of the debt.

**History.** Acts 1949, No. 140, § 167; A.S.A. 1947, § 62-2908.

## RESEARCH REFERENCES

**Ark. L. Rev.** Some Practical Aspects to Drafting in the Estate Planning Field, 21 Ark. L. Rev. 5.

**U. Ark. Little Rock L.J.** Brantley and

Effland, *Inheritance, The Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared*, 3 U. Ark. Little Rock L.J. 361.

## CASE NOTES

## ANALYSIS

Applicability.  
Distributees of Solvent Estate.  
Mortgage Debt.

**Applicability.**

This section is applicable only in cases where secured debts may be discharged out of the general assets of the estate, defined as unpledged personal property of

the estate, and where estate consisted only of Merrill Lynch account which secured margin indebtedness and there were no general assets from which to discharge the indebtedness, this section did not apply. *Balfanz v. Estate of Balfanz*, 31 Ark. App. 71, 787 S.W.2d 699 (1990).

**Distributees of Solvent Estate.**

Both the widow and heirs at law are distributees of a solvent intestate estate



under § 28-1-102 and this section, and as between them, secured debts are to be discharged out of the general estate where the creditor does not pursue the security therefore, giving the widow a dower right in the entire security free from the debt. *Wilcox v. Brewer*, 224 Ark. 546, 274 S.W.2d 777 (1955).

#### **Mortgage Debt.**

Where an estate is solvent, a widow is entitled to have the balance due on a mortgage debt paid out of the general assets of the decedent's estate. *Bruns v. Lotz*, 254 Ark. 701, 496 S.W.2d 376 (1973).

### **28-53-114. Distribution in kind.**

(a) When the estate is otherwise ready to be distributed, it may be distributed in kind, unless the terms of the will provide otherwise or unless a partition sale is ordered.

(b)(1) Upon petition of an interested person, except as provided in subdivision (b)(2) of this section, a distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, and, if he or she notifies the personal representative before the thing is purchased, may elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain the purchase price.

(2) If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for the purchase in lieu of the annuity except to the extent that the will expressly provides that an assignable annuity be purchased.

(c) Nothing in this section shall affect the rights of election by a surviving spouse against a testamentary provision as provided in the Probate Code.

**History.** Acts 1949, No. 140, § 168; referred to in this section, is codified as set A.S.A. 1947, § 62-2909. out in the note following § 28-1-101.

**Publisher's Notes.** The Probate Code,

### **28-53-115. Partition.**

(a) When two (2) or more distributees are entitled to distribution of undivided interests in any personal property of the estate, distribution shall be made of undivided interests therein unless the personal representative or one (1) or more of the distributees shall petition the court, not later than the hearing on the petition for final distribution, to make partition thereof.

(b) If the petition is filed, the court, after notice to persons interested in the property involved, shall proceed to make partition, allot, and divide the property, or order the sale of the property for partition.

(c) In case equal partition cannot be had between the parties without prejudice to the rights or interests of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one (1) or more parties to one (1) or more of the others.

(d) Any two (2) or more parties may agree to accept undivided interests.

(e) Any sale under this section shall be conducted and confirmed in the same manner as other probate sales.

(f) Expenses incident to the partition, including reasonable compensation to commissioners for their services, shall be equitably apportioned by the court among the parties. The amount charged to each party shall constitute a lien on the property allotted to him or her.

**History.** Acts 1949, No. 140, § 169;  
A.S.A. 1947, § 62-2910.

### **28-53-116. Missing or unavailable distributees.**

(a)(1) If, upon the filing of a petition for an order of final distribution, it appears that any distributee of the estate cannot be found, or for any reason the personal representative is unable to deliver to a distributee his or her distributable share of the estate and obtain a receipt therefor, the court may order the personal representative to sell the nonliquid assets distributable to the distributee, in the manner authorized by the provisions of the Probate Code for the sale of the property by a personal representative, and to deposit in the registry of the court, by payment to the clerk of the court, the funds distributable to the distributee. The receipt of the clerk of the court for such funds shall constitute a complete acquittance therefor to the personal representative.

(2) If it is shown that it is in the best interests of the estate that the whole title to the nonliquid assets be sold, clear of the claim of the missing distributee, rather than only that portion of the assets distributable to the distributee, then the sale may be ordered.

(b)(1) The court shall direct, by order, the clerk of the court as to how the funds shall be held in safekeeping and may authorize the clerk to deposit the funds at interest in a designated financial institution, the deposits of which are insured, in whole or in part, by an agency of the United States Government, to the credit of the clerk and his or her successors in office for the use and benefit of the distributee, or to invest the funds, or any part of them, in bonds of the United States or the State of Arkansas. The order shall specify when and under what conditions further orders may be obtained for the ultimate distribution of the fund.

(2) Prior to making the order, the court shall investigate the bond of the clerk, and if it is found to be insufficient in amount to protect the funds of the distributee, the court shall designate the county treasurer as the depository of the funds, subject to the provisions of this section with respect to the deposit of the funds with the clerk of the court.

**History.** Acts 1949, No. 140, § 170;  
1967, No. 287, § 16; A.S.A. 1947, § 62-2911.

**Publisher's Notes.** The Probate Code, referred to in this section, is codified as set out in the note following § 28-1-101.



CASE NOTES

ANALYSIS

Investments.  
Limitations and Laches.  
Ultimate Distribution.

Investments.

An administrator was not authorized to invest in real estate, or otherwise, the balance in his hands, but could put it out at interest, under the direction of the court, until called upon to pay it over. *Wheat v. Moss*, 16 Ark. (3 Barber) 243 (1855) (decision under prior law).

Limitations and Laches.

An order of a probate court that certain heirs had absented themselves from the state for more than 20 years, that they were presumed dead having been gone more than five years, and ordering divi-

sion of the entire estate among the heirs present, excluding the absent heirs, was void as in conflict with this section, but where such an absent heir waited 12 years after such order before bringing suit, he was barred by the limitation in § 16-56-115 and also by laches. *Hill v. Wade*, 155 Ark. 490, 244 S.W. 743 (1922) (decision under prior law).

Ultimate Distribution.

A distribution order of a trial court requiring that the share of two missing paternal heirs be held by the clerk for one year and if not found, their shares were to be distributed equally among the other heirs did not violate this section, as this section gives the court the right to make an “ultimate distribution” of the funds. *Brown v. Smith*, 240 Ark. 1042, 405 S.W.2d 249 (1966).

28-53-117. Escheats.

No part of the present law of escheats shall be repealed by the Probate Code.

**History.** Acts 1949, No. 140, § 170; 1967, No. 287, § 16; A.S.A. 1947, § 62-2911.

referred to in this section, is codified as set out in the note following § 28-1-101.

**Publisher’s Notes.** The Probate Code,

**Cross References.** Escheated estates, § 28-13-101 et seq.

28-53-118. Discharge of personal representative.

(a)(1) Upon the filing of evidence satisfactory to the court that distribution has been made as directed in the order of final distribution, the court shall enter an order discharging the personal representative and his or her surety from further liability or accountability with respect to the administration.

(2) Evidence satisfactory to the court may consist of:

(A) Receipts, unless other written evidence of distribution exists, such as cancelled checks; or

(B) In the case of property under title, a copy of the document transferring title to the distributee.

(b) The order, or an order of discharge entered under § 28-53-104, shall be final, except that upon a petition’s being filed within three (3) years of the entry thereof, the order may be set aside for fraud in the settlement of the account of the personal representative.

**History.** Acts 1949, No. 140, § 171; A.S.A. 1947, § 62-2912; Acts 1999, No. 122, § 1.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey of Arkansas Law: Decedents' Estates, 6 U. Ark. Little Rock L.J. 139.

## CASE NOTES

## ANALYSIS

Appeal by Ward.  
Liability of Representative.  
Statute of Limitations.

**Appeal by Ward.**

Even though a probate court had entered an order closing the estate of a guardian and discharging the executor, a ward's appeal was not subject to dismissal as moot. *Shinley v. Ricks*, 234 Ark. 767, 354 S.W.2d 547 (1962).

**Liability of Representative.**

The adjudication of a probate court in the final settlement of an administrator's accounts as to amount of his liability was conclusive evidence against his sureties in an action on the bond. *George v. Elms*, 46 Ark. 260 (1885) (decision under prior law).

**Statute of Limitations.**

In an action to have an estate recovered and partitioned for benefit of a widow and child where sister of the deceased, who had herself appointed the personal representative of the deceased's estate, failed to notify deceased's wife and adopted daughter, who resided in a foreign country, of deceased's death, or of her appointment, failed to list the wife and daughter as heirs on her petition for letters of administration, and failed to notify them when the estate was closed, the sister breached her duty of trust and was guilty of fraud, and the statute of limitations did not commence to run until the wife was put on notice of her husband's death. *Walters v. Lewis*, 276 Ark. 286, 634 S.W.2d 129 (1982).

**Cited:** *Montgomery v. First Nat'l Bank*, 242 Ark. 329, 414 S.W.2d 109 (1967).

**28-53-119. Reopening administration.**

(a)(1) If, after an estate has been settled and the personal representative discharged, other property of the estate is discovered, or if it appears that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the court, upon the petition of any person interested in the estate and without notice or upon such notice as it may direct, may order that the estate be reopened.

(2) It may reappoint the personal representative or appoint another personal representative to administer such property or perform such act as may be deemed necessary.

(b) Unless the court shall otherwise order, the provisions of the Probate Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be appropriate. However, no claim which is already barred can be asserted in the reopened administration.

**History.** Acts 1949, No. 140, § 172; A.S.A. 1947, § 62-2913.

**Publisher's Notes.** The Probate Code,

referred to in this section, is codified as set out in the note following § 28-1-101.



## CASE NOTES

## ANALYSIS

Construction.  
Petition to Reopen Administration.  
Purposes of Reopening Estate.  
Standing to Petition.

**Construction.**

Section 28-50-101(f) does not repeal this section by implication. Callaghan v. Coberly, 927 F. Supp. 332 (W.D. Ark. 1996).

**Petition to Reopen Administration.**

Where legatees' petition to reopen administration alleged that the administrator was not legally appointed, that she did not qualify for letters testamentary, although the will was admitted to probate, that they received no notice of the filing of accounting, or hearing thereon, and that the administrator, who claimed all of the proceeds of the estate, had a personal interest which conflicted with her official duties, such facts were sufficient to require the taking of proof. Holt v. Moody, 234 Ark. 245, 352 S.W.2d 87 (1961).

Circuit court improperly granted niece's petition to reopen probate of her aunt's estate under as she failed to file the petition within the 90-day limitation period set forth in Ark. R. Civ. P. 60(a) or provide "other cause," such as fraud or lack of notice. Bullock v. Barnes, 366 Ark. 444, 236 S.W.3d 498 (2006).

Probate court did not err in reopening a decedent's estate in order to reform the probate file and a deed to show that real property was conveyed to purchasers with a reservation of one-half the mineral rights on each tract of land because the president of the bank that administered the estate testified that one-half of the mineral rights were not to be sold to purchasers, and his testimony was supported by the notice of sale, the installment note signed by the purchasers, the certificate of purchase, and two deeds, one reserving one-half the mineral rights in each tract and the other conveying one-half the mineral rights to a church; § 28-1-115 was inapplicable and did not limit this section because § 28-1-115 did not speak to reopening the estate, which was authorized by this section. Moore v. First Presbyterian Church of Searcy, Ark., Inc.,

2010 Ark. App. 269, — S.W.3d — (2010), rehearing denied, Moore v. First Presbyterian Church of Searcy Ark., Inc., — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 415 (May 5, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 487 (Oct. 21, 2010).

Ark. R. Civ. P. 60 does not limit the probate court's authority to reopen the estate under this section because this section authorizes the reopening of an estate on the grounds allowed in the statute, separate and apart from the grounds for reopening a case provided under Rule 60. Moore v. First Presbyterian Church of Searcy, Ark., Inc., 2010 Ark. App. 269, — S.W.3d — (2010), rehearing denied, Moore v. First Presbyterian Church of Searcy Ark., Inc., — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 415 (May 5, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 487 (Oct. 21, 2010).

**Purposes of Reopening Estate.**

A probate court has the authority to reopen the administration of an estate for the purpose of determining the proper distribution of personal property alleged to have been omitted from the settlement. Wilson v. Davis, 239 Ark. 305, 389 S.W.2d 442 (1965).

**Standing to Petition.**

A claimant having a personal injury claim resulting from an accident involving an automobile driven by a decedent had no standing to petition for a reopening of the decedent's estate after its administration had been completed, the executor discharged, and there had been no attempt to assert a claim which was barred by statute. Doepeke v. Smith, 248 Ark. 511, 452 S.W.2d 627 (1970).

An estate may not be reopened upon the petition of one claiming damages for the alleged negligence of the decedent who alleges that he was induced to delay filing a claim against the estate within the statutory period by the fraudulent representations of decedent's liability insurance carrier that it would settle his claim as soon as his injuries could be evaluated. Doepeke v. Smith, 248 Ark. 511, 452 S.W.2d 627 (1970).

**Cited:** White v. Welsh, 323 Ark. 479, 915 S.W.2d 274 (1996); Skaggs v. Cul-

liphier, 57 Ark. App. 50, 941 S.W.2d 443 (1997); Tatro v. Langston, 328 Ark. 548, 944 S.W.2d 118 (Ark. 1997).

## SUBCHAPTER 2 — TRANSFERS TO SURVIVING SPOUSES

### SECTION.

28-53-201. Prior law and distributions unaffected.

28-53-202. Applicability of subchapter.

28-53-203. Allocation of assets with value equivalent to federal estate tax value.

### SECTION.

28-53-204. Assets distributed to be representative of appreciation or depreciation of all assets.

28-53-205. Alternative valuations.

**Effective Dates.** Acts 1967, No. 209, § 7: Mar. 6, 1967. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the State of Arkansas that many residents of this State have executed wills in good faith believing them to qualify for the marital deduction for Federal Estate Tax purposes, but which may not so qualify or may be deemed not to so qualify (particularly by virtue of Revenue Procedure 64-19 issued by the Internal Revenue Service), at great financial hazard and loss to their spouses and estates, and causing confusion and expense in the administration of estates and that the enactment of this act will result in curing such disqualifications in many cases. Therefore, an emergency is hereby deemed to exist, and this act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage and approval."

Acts 1987, No. 643, § 5: Apr. 4, 1987. Emergency clause provided: "It is hereby

found and determined by the Arkansas General Assembly that existing statutes concerning transfers of assets from decedents' estates at values referencing federal estate tax values may not be sufficient to preserve the estate tax marital deduction under potential challenges by the Internal Revenue Service where the nonmarital share of the estate is transferred to a pecuniary credit shelter trust and the marital share for the benefit of the surviving spouse consists of the residue of the estate (or trust) assets. If the Internal Revenue Service successfully adhered to such a position, the resulting loss of the marital deduction would bring about substantial estate tax costs, thereby placing an undue burden upon the families of decedents owning farms and family businesses. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from the date of its approval."

## RESEARCH REFERENCES

**Ark. L. Rev.** Act 209 of 1967 — An Act to Obtain the Marital Deduction in Wills or Trusts that Do Not Otherwise Qualify, 22 Ark. L. Rev. 800.

Note, *Hanna v. Hanna: Marital Bequest Interpretation — True Pecuniary or Mini-*

*mum Worth Provision?*, 36 Ark. L. Rev. 413.

Note, *Estate of Shelfer v. Commissioner of Internal Revenue: Is the Tax Court's Position on QTIPs "Stub"born or Justified?*, 48 Ark. L. Rev. 987.



**28-53-201. Prior law and distributions unaffected.**

This subchapter shall not be deemed to create any implication of change in existing law or invalidate any distribution in kind made prior to March 6, 1967, with respect to which values other than those specified in this subchapter were used.

**History.** Acts 1967, No. 209, § 4; A.S.A. 1947, § 62-2909.4.

**28-53-202. Applicability of subchapter.**

This subchapter shall be effective with respect to all wills and revocable inter vivos trusts executed or created before or after March 6, 1967, by persons dying on or after March 6, 1967, and to irrevocable inter vivos trusts created on or after March 6, 1967.

**History.** Acts 1967, No. 209, § 5; A.S.A. 1947, § 62-2909.5.

**28-53-203. Allocation of assets with value equivalent to federal estate tax value.**

Whenever under any last will and testament or trust instrument of a decedent who is survived by a spouse, the executor, trustee, or other fiduciary is authorized to or required by the terms of such an instrument to satisfy a pecuniary bequest, including a pecuniary bequest in trust or transfer in trust of a pecuniary amount to or for the benefit of any beneficiary, by transferring or allocating assets in kind at their federal estate tax values or at any value other than the fair market value of the assets at the date of their distribution or allocation, then the fiduciary shall satisfy the pecuniary bequest or transfer in trust by the distribution or allocation of assets, including cash, having an aggregate fair market value on the date or dates of distribution or allocation equal to the amount of the pecuniary bequest or transfer in trust as finally determined for federal estate tax purposes, unless the will or governing instrument provides otherwise.

**History.** Acts 1967, No. 209, § 1; A.S.A. 1947, § 62-2909.1; Acts 1987, No. 643, § 1.

**A.C.R.C. Notes.** Acts 1987, No. 643, § 3, provided that the act shall be effective with respect to all wills and revocable

inter-vivos trusts executed or created before or after April 4, 1987, by persons dying on or after January 1, 1987, and to irrevocable inter-vivos trusts created on or after April 4, 1987.

**RESEARCH REFERENCES**

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Over-

view of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

## CASE NOTES

**Cited:** *Hanna v. Hanna*, 273 Ark. 399, 619 S.W.2d 655 (1981).

**28-53-204. Assets distributed to be representative of appreciation or depreciation of all assets.**

A provision in a last will and testament or trust instrument that an executor or fiduciary authorized or required by its terms to satisfy a pecuniary bequest or transfer in trust with assets in kind at their federal estate tax values or at any values other than fair market values at date of distribution or allocation shall act fairly or equitably or not arbitrarily in satisfying the bequest or transfer, shall be deemed, in the absence of clear provisions to the contrary, to be a direction to distribute or allocate assets, including cash, fairly representative, on the date of distribution or allocation, of the appreciation or depreciation in the value of all property available for distribution or allocation.

**History.** Acts 1967, No. 209, § 2; A.S.A. 1947, § 62-2909.2.

**28-53-205. Alternative valuations.**

(a) Whenever there is a provision in the will or governing instrument that an executor or fiduciary who is authorized or required by its terms to satisfy a pecuniary bequest or transfer in trust, with assets in kind at their federal estate tax values or at any value other than fair market values at date or dates of distribution or allocation, is authorized or required, in satisfying the bequest or transfer, to either:

(1) Distribute or allocate assets, including cash, having an aggregate fair market value on the date or dates of distribution or allocation equal to or at least equal to the amount of the pecuniary bequest or transfer in trust as finally determined for federal estate tax purposes; or

(2) Distribute or allocate assets, including cash, fairly representative, on the date or dates of distribution or allocation, of the appreciation or depreciation in the value of all properties available for distribution or allocation.

(b) The executor or fiduciary, nevertheless, must distribute or allocate assets, including cash, having an aggregate fair market value on the date or dates of distribution or allocation equal to the amount of the pecuniary bequest or transfer in trust as finally determined for federal estate tax purposes.

**History.** Acts 1967, No. 209, § 3; A.S.A. 1947, § 62-2909.3; Acts 1987, No. 643, § 2.

**A.C.R.C. Notes.** Acts 1987, No. 643, § 3, provided that the act shall be effective with respect to all wills and revocable

inter-vivos trusts executed or created before or after April 4, 1987, by persons dying on or after January 1, 1987, and to irrevocable inter-vivos trusts created on or after April 4, 1987.



RESEARCH REFERENCES

**Ark. L. Rev.** Haight, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

CHAPTER 54

UNIFORM ESTATE TAX APPORTIONMENT ACT

SECTION.	SECTION.
28-54-101. Short title.	tax from property in possession of fiduciary.
28-54-102. Definitions.	
28-54-103. Apportionment by will or other dispositive instrument.	28-54-109. Collection of estate tax by fiduciary.
28-54-104. Statutory apportionment of estate taxes.	28-54-110. Right of reimbursement.
28-54-105. Credits and deferrals.	28-54-111. Action to determine or enforce chapter.
28-54-106. Insulated property — Advancement of tax.	28-54-112. Uniformity of application and construction.
28-54-107. Apportionment and recapture of special elective benefits.	28-54-113. Severability.
28-54-108. Securing payment of estate	28-54-114. Delayed application.
	28-54-115. Effective date.

28-54-101. Short title.

This chapter may be cited as the Uniform Estate Tax Apportionment Act.

**History.** Acts 2007, No. 276, § 1.

28-54-102. Definitions.

In this chapter:

(1) “Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

(A) any claim or expense allowable as a deduction for purposes of the tax;

(B) the value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and

(C) any amount added to the decedent’s gross estate because of a gift tax on transfers made before death.

(2) “Estate tax” means a federal, state, or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death.

(3) “Gross estate” means, with respect to an estate tax, all interests in property subject to the tax.

(4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) "Ratable" means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. "Ratably" has a corresponding meaning.

(6) "Time-limited interest" means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

(7) "Value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

**History.** Acts 2007, No. 276, § 1.

### **28-54-103. Apportionment by will or other dispositive instrument.**

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(3) If any portion of an estate tax is not apportioned pursuant to paragraph (1) or (2), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.



(b) Subject to subsection (c), and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) If an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest,

(A) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument, or

(B) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(2) If an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(3) Except as otherwise provided in paragraph (4), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under § 28-54-107, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

(c) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

**History.** Acts 2007, No. 276, § 1.

#### **28-54-104. Statutory apportionment of estate taxes.**

To the extent that apportionment of an estate tax is not controlled by an instrument described in § 28-54-103 and except as otherwise provided in §§ 28-54-106 and 28-54-107, the following rules apply:

(1) Subject to paragraphs (2), (3), and (4), the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

(2) A generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the interest in property is transferred.

(3) If property is included in the decedent's gross estate because of Section 2044 of the Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate.

(4) Except as otherwise provided in § 28-54-103(b)(4) and except as to property to which § 28-54-107 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

**History.** Acts 2007, No. 276, § 1.

### **28-54-105. Credits and deferrals.**

Except as otherwise provided in §§ 28-54-106 and 28-54-107, the following rules apply to credits and deferrals of estate taxes:

(1) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(2) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(3) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

**History.** Acts 2007, No. 276, § 1.



**28-54-106. Insulated property — Advancement of tax.**

(a) In this section:

(1) “Advanced fraction” means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(2) “Advanced tax” means the aggregate amount of estate tax attributable to interests in insulated property which is required to be advanced by uninsulated holders under subsection (c).

(3) “Insulated property” means property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(4) “Uninsulated holder” means a person who has an interest in uninsulated property.

(5) “Uninsulated property” means property included in the apportionable estate other than insulated property.

(b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests in uninsulated property subject to a time-limited interest other than property to which § 28-54-107 applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

(c) Subject to § 28-54-109(b) and (d), an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under § 28-54-102(1)(B) as if those interests were in uninsulated property.

(d) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(e) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total undistributed property.

(f) Upon a distribution of insulated property for which, pursuant to subsection (d), the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee’s property to secure the distributee’s obligation to that uninsulated holder.

**28-54-107. Apportionment and recapture of special elective benefits.**

(a) In this section:

(1) "Special elective benefit" means a reduction in an estate tax obtained by an election for:

(A) a reduced valuation of specified property that is included in the gross estate;

(B) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(C) an exclusion from the gross estate of specified property.

(2) "Specified property" means property for which an election has been made for a special elective benefit.

(b) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations, and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(c) An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture.

**History.** Acts 2007, No. 276, § 1.

**28-54-108. Securing payment of estate tax from property in possession of fiduciary.**

(a) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(b) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(c) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

**History.** Acts 2007, No. 276, § 1.



**28-54-109. Collection of estate tax by fiduciary.**

(a) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

(b) Except as otherwise provided in § 28-54-106, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate which is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate;

(3) any person having an interest in the gross estate.

(c) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(d) The total tax collected from a person pursuant to this chapter may not exceed the value of the person's interest.

**History.** Acts 2007, No. 276, § 1.

**28-54-110. Right of reimbursement.**

(a) A person required under § 28-54-109 to pay an estate tax greater than the amount due from the person under § 28-54-103 or § 28-54-104 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by § 28-54-103 or § 28-54-104 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under § 28-54-109(b).

(b) A fiduciary may enforce the right of reimbursement under subsection (a) on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person.

**History.** Acts 2007, No. 276, § 1.

**28-54-111. Action to determine or enforce chapter.**

A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this chapter.

**History.** Acts 2007, No. 276, § 1.

**28-54-112. Uniformity of application and construction.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History.** Acts 2007, No. 276, § 1.

**28-54-113. Severability.**

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

**History.** Acts 2007, No. 276, § 1.

**28-54-114. Delayed application.**

(a) Sections 28-54-103 — 28-54-107 do not apply to the estate of a decedent who dies more than three years after January 1, 2008, if the decedent continuously lacked testamentary capacity from the expiration of the three-year period until the date of death.

(b) For the estate of a decedent who dies on or after January 1, 2008, to which §§ 28-54-103 — 28-54-107 do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before January 1, 2008.

**History.** Acts 2007, No. 276, § 1.

**28-54-115. Effective date.**

This chapter takes effect on January 1, 2008.

**History.** Acts 2007, No. 276, § 1.

**CHAPTERS 55-63**

[Reserved]

***SUBTITLE 5. FIDUCIARY RELATIONSHIPS*****CHAPTER 64****GENERAL PROVISIONS**

[Reserved]

**CHAPTER 65****GUARDIANS GENERALLY****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. APPOINTMENT.
3. POWERS AND DUTIES.
4. TERMINATION OF GUARDIANSHIP.
5. DISPENSING WITH GUARDIANSHIP.
6. FOREIGN GUARDIANS.



SUBCHAPTER  
7. PUBLIC GUARDIAN FOR ADULTS.

**Publisher's Notes.** Acts 1985, No. 940, § 1, provided that Acts 1983, No. 345, impliedly repealed several sections of the Arkansas Guardianship Law and provided that, because Acts 1983, No. 345, went beyond the purposes for which it was presented to the General Assembly, it was

determined that it would be in the best interests of the people of this state that Acts 1983, No. 345, be repealed and the provisions of the previous guardianship law be, in essence, reenacted, with amendments.

SUBCHAPTER 1 — GENERAL PROVISIONS

- SECTION.  
28-65-101. Definitions.  
28-65-102. Relationship of chapter to Uniform Veterans' Guardianship Act.  
28-65-103. Applicability of other acts.  
28-65-104. Incapacitated persons.  
28-65-105. Purpose of guardianship.

- SECTION.  
28-65-106. Rights of incapacitated persons.  
28-65-107. Jurisdiction of courts.  
28-65-108. Compensation of guardian.  
28-65-109. Actions by ward against guardian.

**Cross References.** Limited relaxation of the prudent man rule for fiduciaries and financial institutions, § 28-71-107.  
**Effective Dates.** Acts 1987, No. 16, § 4: Feb. 9, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that considerable doubt and confusion has been cast on various guardianships established during the period from the effective date of Act 345 of 1983 until the effective date of Act 940 of 1985 due to the fact that the provisions of Act 345 of 1983 were unclear with respect to the repeal of various other laws relating to guardianships; that it is urgent that such doubt be removed at the earliest possible date in order that guardians appointed during that period can proceed to carry out their official responsibilities and to thereby accomplish the purposes for which the guardianships were established; that this Act is designed to remove

this doubt and specifically validate all such guardianships and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."  
Acts 2007, No. 862, § 5: Apr. 3, 2007, provided: "Contingent effectiveness. This act shall take effect upon the occurrence of the following: (1) The Director of the Division of Aging and Adult Services of the Department of Health and Human Services determines that adequate appropriation, funding, and positions are available to carry out a public guardianship program for adults; and (2) The director appoints an employee of the Division of Aging and Adult Services to serve as Public Guardian for Adults."  
Acts 2011, No. 159, § 1: Jan. 1, 2012.

RESEARCH REFERENCES

**Am. Jur.** 39 Am. Jur. 2d, Guar. & W., § 1 et seq.      **C.J.S.** 39 C.J.S., Guar. & W., § 1 et seq.

**28-65-101. Definitions.**

As used in this chapter:

(1) "Essential requirements for health or safety" means the health care, food, shelter, clothing, and protection without which serious illness or serious physical injury will occur;

(2) "Evaluation" means a professional assessment of the abilities of the respondent and the impact of any impairments on the individual's capability to meet the essential requirements for his or her health or safety or to manage his or her estate;

(3) "Guardian" means one appointed by a court to have the care and custody of the person or of the estate, or of both, of an incapacitated person;

(4) "Guardian ad litem" means one appointed by a court in which a particular proceeding is pending to represent a ward or an unborn person in that proceeding;

(5)(A) "Incapacitated person" means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate.

(B) "Incapacitated person" includes an endangered or impaired adult as defined in the Adult Maltreatment Custody Act, § 9-20-103, who is in the custody of the Department of Human Services.

(C) Nothing in this chapter shall be construed to mean a person is incapacitated for the sole reason he or she relies consistently on treatment by spiritual means through prayer alone for healing in accordance with his or her religious tradition and is being furnished such treatment;

(6) "Least restrictive alternative" means the form of assistance that least interferes with the legal capacity of the respondent to act in his or her own behalf;

(7) "Limited guardian" means one whose powers and authority have been limited to the specific powers, authorities, and duties set forth in the order of appointment;

(8) "Professional" means a physician, licensed psychologist, or licensed certified social worker with training, experience, and knowledge of the particular alleged disability of the respondent;

(9) "Temporary guardian" means a guardian appointed pursuant to § 28-65-218; and

(10) "Ward" means an incapacitated person for whom a guardian has been appointed.

**History.** Acts 1985, No. 940, § 2; A.S.A. 1947, § 57-821; Acts 2007, No. 121, § 1; 2011, No. 1027, § 1.

**Amendments.** The 2007 amendment inserted (5)(B) and redesignated former (5)(B) as (5)(C).

The 2011 amendment inserted "endangered or" and substituted "§ 9-20-103" for "§ 9-20-103(8)(A)" in (5)(B).



## RESEARCH REFERENCES

**Ark. L. Rev.** Pecora, The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings, 43 Ark. L. Rev. 345.

**U. Ark. Little Rock L.J.** Survey — Probate, 10 U. Ark. Little Rock L.J. 599.

## CASE NOTES

**“Incompetent.”**

The definition of an “incompetent” as set out in former statute did not change the test of competency approved by the Supreme Court in many decisions. Powers

v. Chisman, 217 Ark. 508, 231 S.W.2d 598 (1950) (decision under prior law).

**Cited:** In re Bailey, 299 Ark. 352, 771 S.W.2d 779 (1989).

## **28-65-102. Relationship of chapter to Uniform Veterans’ Guardianship Act.**

(a) The provisions of this chapter shall:

(1) Extend to the persons specifically provided for under the terms of the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq; and

(2) Be cumulative to the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq.

(b) However, all conflicts arising between the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq., and this chapter shall be resolved by giving effect to the law as stated in the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq., in cases to which the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq., applies and then only as applicable to assets derived through the Veterans’ Administration.

**History.** Acts 1985, No. 940, § 3; A.S.A. 1947, § 57-822.

## **28-65-103. Applicability of other acts.**

(a) The provisions of §§ 28-1-101 — 28-1-104, 28-1-106, 28-1-108 — 28-1-113, 28-1-115, and 28-1-116, unless therein expressly restricted to decedents’ estates, shall apply to guardianships.

(b) When sections in subtitle 4 of this title are incorporated by reference by any sections of this chapter they shall be applied as if “decedent” read “incapacitated person” and “personal representative” read “guardian”. Similarly, other terms applicable to guardianship shall be substituted for terms applicable to decedents’ estates.

(c) In those cases in which no specific rule is provided for guardianships in this chapter, the rule governing decedents’ estates in Acts 1949, No. 140, as amended, shall apply to guardianships when applicable thereto and not inconsistent with the provisions of this chapter.

(d)(1) Nothing in this chapter repeals or supersedes §§ 28-71-101 — 28-71-106.

(2) If there is a conflict between this chapter and §§ 28-71-101 — 28-71-106, then the provisions of §§ 28-71-101 — 28-71-106 shall control.

(e) This chapter does not invalidate appointments of guardians heretofore made pursuant to Acts 1983, No. 345 [repealed], but from and after June 28, 1985, this chapter shall apply to all such guardianships.

(f)(1)(A) It is found and determined by the General Assembly that:

(i) Act 345 of 1983 [repealed] governing guardianships for incapacitated persons created considerable confusion concerning various other laws relating to the appointment of guardians;

(ii) Part of that confusion was due to uncertainty as to whether Act 345 of 1983 [repealed], was intended to repeal or supersede various other laws relating to guardianship;

(iii) As a result of this confusion, guardianships were established by various courts in the state under the provisions of various laws which were in effect concurrently with or immediately prior to Act 345 of 1983 [repealed], and there is now some question concerning the validity of some of those guardianships; and

(iv) This confusion and doubt should be removed in order that guardians appointed during that period can continue to carry out their responsibilities without the doubt and disagreement concerning their official capacity and authority.

(B) It is therefore the intent and purpose of this subsection to validate any and all guardianships established from July 4, 1983, until June 28, 1985, under authority of Act 345 of 1983 [repealed] or any law in effect concurrently with or immediately prior to July 4, 1983.

(2) Any guardianship established during the period from July 4, 1983, to June 28, 1985, whether established under Act 345 of 1983 [repealed], or under any act in effect concurrently with Act 345 of 1983 [repealed], or any act in effect immediately prior to July 4, 1983, is declared to be valid and shall continue in effect for the purposes established. However, the provisions of this chapter shall be applicable to all guardianships so established except as otherwise provided in § 28-65-102.

(g) The appropriate jurisdiction for an adult guardianship action, excluding proceedings under the Adult Custody Maltreatment Act, § 9-20-101 et seq., under this chapter that involve a party residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

(h) The appropriate jurisdiction for an adult guardianship action under the Adult Custody Maltreatment Act, § 9-20-101 et seq., that involves a maltreated adult residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

**History.** Acts 1985, No. 940, § 4; A.S.A. 1947, § 57-823; Acts 1987, No. 16, §§ 1, 2; 2011, No. 159, § 2.

**Amendments.** The 2011 amendment added (g) and (h).



RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey —  
Probate, 10 U. Ark. Little Rock L.J. 599.

CASE NOTES

**Cited:** Smart v. Biggs, 26 Ark. App.  
141, 760 S.W.2d 882 (1988).

28-65-104. Incapacitated persons.

For purposes of this chapter, the following persons are incapacitated persons:

- (1) Persons under age eighteen (18) whose disabilities have not been removed; and
- (2) Persons who are detained or confined by a foreign power or who have disappeared.

**History.** Acts 1985, No. 940, § 2; A.S.A.  
1947, § 57-821.

RESEARCH REFERENCES

<b>Ark. L. Rev.</b> Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.	Survey, Probate, 8 U. Ark. Little Rock L.J. 597. Survey — Probate, 10 U. Ark. Little Rock L.J. 599.
<b>U. Ark. Little Rock L.J.</b> Legislative	

28-65-105. Purpose of guardianship.

Guardianship for an incapacitated person shall be:

- (1) Used only as is necessary to promote and protect the well-being of the person and his or her property;
- (2) Designed to encourage the development of maximum self-reliance and independence of the person; and
- (3) Ordered only to the extent necessitated by the person’s actual mental, physical, and adoptive limitations.

**History.** Acts 1985, No. 940, § 2; A.S.A.  
1947, § 57-821.

RESEARCH REFERENCES

<b>Ark. L. Rev.</b> Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.	Survey, Probate, 8 U. Ark. Little Rock L.J. 597. Survey — Probate, 10 U. Ark. Little Rock L.J. 599.
<b>U. Ark. Little Rock L.J.</b> Legislative	

28-65-106. Rights of incapacitated persons.

An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights

except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court.

**History.** Acts 1985, No. 940, § 2; A.S.A. 1947, § 57-821.

### RESEARCH REFERENCES

<p><b>Ark. L. Rev.</b> Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.</p> <p><b>U. Ark. Little Rock L.J.</b> Legislative</p>	<p>Survey, Probate, 8 U. Ark. Little Rock L.J. 597.</p> <p>Survey — Probate, 10 U. Ark. Little Rock L.J. 599.</p>
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### 28-65-107. Jurisdiction of courts.

(a) The jurisdiction of the circuit court over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal.

(b) The provisions of this chapter shall not affect the jurisdiction of any court authorized to remove disabilities of minority.

(c)(1) If a juvenile is the subject matter of an open case filed under the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., the guardianship petition shall be filed in that case if the juvenile resides in Arkansas.

(2) If the juvenile resides out of state through the Interstate Compact on the Placement of Children, § 9-29-201 et seq., the guardianship petition may be filed in Arkansas or it may be filed in the state in which the juvenile resides, subject to approval by the receiving state.

(d) The appropriate jurisdiction for an adult guardianship action, excluding proceedings under the Adult Custody Maltreatment Act, § 9-20-101 et seq., under this chapter that involve a party residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

(e) The appropriate jurisdiction for an adult guardianship action under the Adult Custody Maltreatment Act, § 9-20-101 et seq., that involves a maltreated adult residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

**History.** Acts 1985, No. 940, § 5; A.S.A. 1947, § 57-824; Acts 2001, No. 1029, § 2; 2003, No. 1185, § 279; 2009, No. 301, § 1; 2011, No. 159, § 3.

**Amendments.** The 2009 amendment, in (c), inserted (c)(2), redesignated the

remaining text accordingly, and inserted “if the juvenile resides in Arkansas” in (c)(1).

The 2011 amendment added (d) and (e).

**Cross References.** Jurisdiction of adoption of minors, § 9-9-205.



## CASE NOTES

## ANALYSIS

**In General.**

Discretion of Judge.  
 Extent of Jurisdiction.  
 Judicial Immunity.  
 Scope of Jurisdiction.

**In General.**

Former similar statute took jurisdiction for the appointment of guardians from the juvenile court and vested it exclusively in the probate court. *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (Ark. 1964) (decision under prior law).

Circuit court was vested with jurisdiction to appoint a guardian under subsection (a) of this section; therefore, the circuit court had subject-matter jurisdiction to appoint a guardian for the mother's children. *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004).

**Discretion of Judge.**

A probate judge was invested with a sound legal discretion in the appointment of guardians, and his judgment would not be overruled except in cases of manifest error or abuse of such discretion. *Sadler v. Rose*, 18 Ark. 600 (1857) (decision under prior law).

**Extent of Jurisdiction.**

The jurisdiction of a probate court in guardianship matters was limited to guardians and persons of unsound mind and their estates as vested in courts of probate at the time of the adoption of Ark. Const., Amend. 24, Art. 7, § 34, or as thereafter prescribed by law. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979) (decision under prior law).

A probate court's jurisdiction in guardianship matters was limited to persons of unsound mind; that inability which permitted the appointment of a guardian was limited to some form of mental incapacity. *In re Estate of Lemley*, 9 Ark. App. 140, 653 S.W.2d 141 (1983) (decision under prior law).

The circuit court's power to review and conclude, subject to appeal, whether the money is "accessible", under whatever state or federal regulations may apply, does not mean that the circuit court has the authority to determine how a guard-

ian is to use a ward's funds; that decision lies exclusively within the jurisdiction of the probate court according to subsection (a) of this section. Another section, § 28-65-310(c)(3), deals with the probate court's authority to invade the principal of a minor ward's estate to provide for support. *In re Porter*, 298 Ark. 121, 765 S.W.2d 944 (1989) (decision under prior law).

Probate courts are courts of limited and specific jurisdiction, and they have only the powers conferred by the Constitution or by statute or powers necessarily incidental to those specifically granted. *Arkansas Dep't of Human Servs. v. Estate of Hogan*, 314 Ark. 19, 858 S.W.2d 105 (1993) (decision under prior law).

Subsection (a) of this section and § 28-65-317 bring into focus the settled rule that the probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or necessarily incidental thereto. *Arkansas State Employees Ins. Advisory Comm. v. Estate of Manning*, 316 Ark. 143, 870 S.W.2d 748 (1994) (decision under prior law).

The probate court had no subject matter jurisdiction to rule on an insurer's subrogation claim. *Arkansas State Employees Ins. Advisory Comm. v. Estate of Manning*, 316 Ark. 143, 870 S.W.2d 748 (1994) (decision under prior law).

In an accounting action, a probate court did not err in failing to stay the case to allow for the resolution of a circuit court lawsuit alleging breach of fiduciary duties and other torts; a probate court was the appropriate place to proceed with an accounting action. *In re Estates McKnight v. Bank of Am., N.A.*, 372 Ark. 376, 277 S.W.3d 173 (2008).

**Judicial Immunity.**

In an action brought by a divorced mother against a probate judge for damages for emotional distress suffered when she was temporarily denied custody of her minor son pursuant to an order issued by the probate judge, where the divorced mother failed to show a clear absence of the judge's jurisdiction to issue a custody order, the doctrine of judicial immunity was applicable and the action against the

judge was properly dismissed. *Harley v. Oliver*, 539 F.2d 1143 (8th Cir. 1976) (decision under prior law).

### Scope of Jurisdiction.

In a proceeding for the appointment of a guardian, the question of whether children were neglected by the failure of their parents to permit vaccination so as to enable the children to attend school was properly before the probate court, as it had exclusive jurisdiction in matters of guardianship and was to try all issues of law and of facts arising in the proceedings

within its jurisdiction. *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (Ark. 1964) (decision under prior law).

The probate court has exclusive jurisdiction over the payment of claims against a ward's account; therefore, the circuit court was in error in ordering payment. While appellee acted properly in filing and establishing its foreign judgment in circuit court, it then was required to file its claim in the probate court to receive payment. *Forehand v. American Collection Serv., Inc.*, 307 Ark. 342, 819 S.W.2d 282 (1991) (decision under prior law).

## 28-65-108. Compensation of guardian.

(a) A guardian shall be allowed such compensation for his or her services as guardian as the court shall deem just and reasonable.

(b) If the court finds that the guardian has failed to discharge his or her duties as such in any respect, it may deny him or her any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

**History.** Acts 1985, No. 940, § 42; A.S.A. 1947, § 57-861.

## CASE NOTES

### ANALYSIS

Allowance Generally.  
Attorney's Fees.  
Brokers' Fees.  
Effect of Removal.  
Reasonable Fees.

### Allowance Generally.

Compensation of a guardian could be allowed on final settlement. *France v. Shockey*, 92 Ark. 41, 121 S.W. 1056 (1909) (decision under prior law).

### Attorney's Fees.

A coguardian of an incompetent ward could retain counsel without court authorization, and such counsel was entitled to reasonable attorney fees set by the probate court for services rendered for the estate of the ward despite the other coguardian's objection that the counsel was representing the coguardian personally where the objecting coguardian had a conflict of interest with the estate of the ward. *Jones v. Barnett*, 236 Ark. 117, 365 S.W.2d 241 (1963) (decision under prior law).

### Brokers' Fees.

Where a guardian employed a broker to sell a ward's realty, the sale was upon the order and approval of a probate court, and the services were beneficial to the ward's estate, the ward's estate was liable for a commission since the guardian had a right to employ the services of a competent real estate agent to assist in the sale of the ward's property. *Gordon v. Burns*, 203 Ark. 13, 155 S.W.2d 588 (1941) (decision under prior law).

### Effect of Removal.

On removal, a guardian could not claim a commission on an amount paid over on final settlement. *Beakley v. Cunningham*, 121 Ark. 457, 181 S.W. 287 (1915) (decision under prior law).

### Reasonable Fees.

Where the assets of a ward's estate totaled over \$200,000 and the yearly income exceeded \$18,000, an award to the guardian of a fee of \$1,377.75 for 14 months services in which guardian had appeared in more than 30 hearings would be justified. *Omohundro v. Patty*, 230 Ark.



252, 321 S.W.2d 746 (1959) (decision under prior law).

## 28-65-109. Actions by ward against guardian.

An action by a ward against his or her guardian for a settlement of his or her accounts, for additional security, or for his or her removal, must be brought in the county in which the guardian was qualified.

**History.** Acts 1985, No. 940, § 44; A.S.A. 1947, § 57-863.

### SUBCHAPTER 2 — APPOINTMENT

#### SECTION.

- 28-65-201. For whom guardian may be appointed.
- 28-65-202. Venue.
- 28-65-203. Qualifications of guardian.
- 28-65-204. Preferences.
- 28-65-205. Petition.
- 28-65-206. Single guardianship for two or more incapacitated persons.
- 28-65-207. Notice of hearing for appointment.
- 28-65-208. Notice of other hearings.
- 28-65-209. Request for special notice of hearings.
- 28-65-210. Proof required for appointment of guardian.

#### SECTION.

- 28-65-211. Determination of incapacity — Evidence required.
- 28-65-212. Evaluations.
- 28-65-213. Hearing — Effect of determinations.
- 28-65-214. Guardianship order.
- 28-65-215. Bond of guardian.
- 28-65-216. Issuance of letters.
- 28-65-217. Form of letters.
- 28-65-218. Temporary guardian.
- 28-65-219. Substitution — Removal.
- 28-65-220. Successor guardian.
- 28-65-221. Standby guardians.

**Effective Dates.** Acts 1987, No. 535, § 3: Apr. 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Supreme Court recently invalidated Arkansas' Temporary Guardianship Law; that this Act is designed to meet the court's objections to the previous law; that until this Act goes into effect, there will be no Temporary Guardianship Law; and that a temporary guardianship law is immediately necessary in order to adequately protect incapacitated persons. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 11, § 5: Feb. 1, 1991. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in appoint-

ing a guardian for a minor child the court should give due regard to any written instrument executed by the legal custodian of the minor child; and this act is immediately necessary to insure that an appropriate guardian is appointed for a minor child. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1295, § 5: Apr. 22, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly that the existing temporary guardianship statute does not provide for notice to parents of minors for whom temporary guardianships have been appointed; that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Su-

preme Court, and that there is an urgent need to insure that the law provides due process to parents of minors for whom temporary guardians are appointed. Therefore, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force and effect from the date of its passage and approval."

Acts 2007, No. 862, § 5, provided: "This act shall take effect upon the occurrence of

the following: (1) The Director of the Division of Aging and Adult Services of the Department of Health and Human Services determines that adequate appropriation, funding, and positions are available to carry out a public guardianship program for adults; and (2) The director appoints an employee of the Division of Aging and Adult Services to serve as Public Guardian for Adults." This contingency is deemed to have been met by Acts 2009, No. 433.

## RESEARCH REFERENCES

**ALR.** Validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization. 44 A.L.R.4th 1207.

**Am. Jur.** 39 Am. Jur. 2d, Guar. & W., § 34 et seq.

**Ark. L. Rev.** Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.

Brantley, Use of the Trust to Manage Property of the Elderly or Disabled, 42 Ark. L. Rev. 619.

**C.J.S.** 39 C.J.S., Guar. & W., § 7 et seq.

**U. Ark. Little Rock L.J.** Legislative Survey, Probate, 8 U. Ark. Little Rock L.J. 597.

## 28-65-201. For whom guardian may be appointed.

(a) A guardian of the estate may be appointed for any incapacitated person.

(b) A guardian of the person may be appointed for any incapacitated person except a married minor who is incapacitated solely by reason of his or her minority.

**History.** Acts 1985, No. 940, § 6; A.S.A. 1947, § 57-825.

## CASE NOTES

### ANALYSIS

Incompetent Attorney.  
Jurisdiction.  
Lessened Mental Faculties.  
Measure of Capacity.  
Medical Evidence.  
Physical Impairment.

### Incompetent Attorney.

The Supreme Court declined to adopt a proposal granting a probate judge jurisdiction to appoint a trustee for a lawyer who was disabled, deceased, or had disappeared, since this proposal would have

clearly conflicted with the statutory scheme for establishing a guardianship for an incompetent attorney as well as the statutory scheme for decedent's estates under former similar statutes and since there were express statutes which conflicted with the proposal for attorneys who had disappeared. In re Committee on Professional Ethics, 273 Ark. 496, 621 S.W.2d 223 (1981) (decision under prior law).

### Jurisdiction.

Mere physical presence of incompetent, who had resided in sister state for 68 years, was a proper basis of jurisdiction in



this state of her person and estate. In re Powers, 311 Ark. 101, 841 S.W.2d 626 (1992).

#### **Lessened Mental Faculties.**

Where the physical condition of a party has lessened his mental faculties, a guardian could be appointed. Parker v. Parker, 231 Ark. 635, 331 S.W.2d 694 (1960) (decision under prior law).

#### **Measure of Capacity.**

As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing; and where it is clearly made to appear that the mental capacity and imbecility is of such a degree as to render the person unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his infirmity, then such person is in contemplation of law not of sound mind. Weakness of understanding is not alone sufficient to show mental unsoundness if capacity remains to see things in their

true relations and where the individual has a moderate comprehension of his immediate duties and of the value and use of his property. Deffenbaugh v. Estate of Claphan, 48 Ark. App. 208, 893 S.W.2d 350 (1995).

#### **Medical Evidence.**

A court could not adjudge one incompetent for any reason other than minority without medical evidence. Sparks v. First Nat'l Bank, 242 Ark. 435, 413 S.W.2d 865 (1967) (decision under prior law).

#### **Physical Impairment.**

Where the petition for appointment of a guardian merely stated that a person was unable to care for herself because of physical impairment, the probate court had no jurisdiction to appoint a guardian for such a person, at least under the law at the time of the guardianship proceeding. Keenan v. Peevy, 267 Ark. 218, 590 S.W.2d 259 (1979) (decision under prior law).

**Cited:** Earle v. Bennett, 289 Ark. 448, 711 S.W.2d 829 (1986); Hicks v. Bates, 104 Ark. App. 348, 292 S.W.3d 850 (2009).

### **28-65-202. Venue.**

(a) The venue for the appointment of a guardian shall be:

(1) In the county of this state which is the domicile of the incapacitated person;

(2) If the incapacitated person is not domiciled in this state, but resides in this state, then in the county of his or her residence; or

(3) If the incapacitated person is neither domiciled nor resides in this state, then in the county in this state in which his or her property, or the greater part of it in value, is situated.

(b)(1) If proceedings are commenced in more than one (1) county, they shall be stayed, except in the county where first commenced, until final determination of venue by the circuit court of the county where first commenced. If the proper venue is finally determined to be in another county, the court shall transmit the original file to the proper county.

(2) The proceeding shall be deemed commenced by the filing of a petition, and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incapacitated person in this state.

(c)(1) If it appears to the court at any time before the termination of the guardianship that the proceeding was commenced in a county of improper venue, the court shall order the proceeding transferred to another circuit court.

(2) If it appears that the residence of the ward or of the guardian has been changed to another county or, in case of guardianship of the estate,

that a transfer would be for the best interest of the ward and his or her estate, then the court in its discretion may order the proceedings transferred to another circuit court.

(3) However, in case of any transfer of proceedings, all pertinent papers, files, and certified copies of any court orders shall be transferred to the receiving court.

(4) In case of transfer, the receiving court shall complete the proceedings as if originally commenced in it.

**History.** Acts 1985, No. 940, § 7; A.S.A. 1947, § 57-826.

## CASE NOTES

### ANALYSIS

Determination of Venue.  
Minors Living with Grandparents.  
Residence of Guardians.  
Residence of Minors.

#### **Determination of Venue.**

Where guardianship proceedings were commenced first in one county by the filing of a petition in the probate court of that county on July 24, 1959, a guardianship proceeding filed on August 29, 1959, in another county should have been stayed until the determination of venue by the probate court of the first county. *Watt v. Bryan*, 231 Ark. 799, 332 S.W.2d 609 (1960) (decision under prior law).

#### **Minors Living with Grandparents.**

Where the evidence showed that the maternal grandfather of a minor, whose father shot his mother to death in a heated argument, brought the minor to Arkansas from Texas, that the minor had lived with his grandparents in Arkansas for 10 months as of the date of the guardianship hearing, and that the minor attended public school in Arkansas and was engaged in church and athletic activities, a probate court in Arkansas had the jurisdiction to appoint the maternal grandfather as the guardian for the minor. *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982) (decision under prior law).

#### **Residence of Guardians.**

A guardian who would have custody of a minor could be appointed by the probate court of a county in which he resides, even though he may be domiciled elsewhere. *Shaw v. Shaw*, 251 Ark. 665, 473 S.W.2d 848 (1971) (decision under prior law).

#### **Residence of Minors.**

Where in a divorce action in Texas the custody of minor children was awarded to the father and the mother subsequently moved with the children to Arkansas where she filed a divorce petition seeking custody of the children, the physical presence of the children in Arkansas was a proper basis for an Arkansas court to determine whether there should be a change in custody of the children involved. *Shaw v. Shaw*, 251 Ark. 665, 473 S.W.2d 848 (1971) (decision under prior law).

The child at issue was domiciled in Phillips County and, therefore, venue there was proper where (1) before her mother's death, the child lived with her mother in Phillips County, and (2) the only reason the child was physically residing in Jefferson County after her mother's death was because the appellant had removed the child to that county pursuant to an order granting him temporary guardianship. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

**Cited:** *In re Pollock*, 293 Ark. 195, 736 S.W.2d 6 (1987); *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004).

## **28-65-203. Qualifications of guardian.**

(a) A natural person who is a resident of this state, eighteen (18) or more years of age, of sound mind, not a convicted and unpardoned felon,



is qualified to be appointed guardian of the person and of the estate of an incapacitated person.

(b) However, notwithstanding the provisions in subsection (a) of this section, a natural person who is a resident of this state, eighteen (18) years of age or older, of sound mind, and a convicted and unpardoned felon is qualified to be a guardian of the person or estate of a minor in the custody of the Department of Human Services if under § 9-28-409 the person:

(1) That person's home has been opened as a foster home; or

(2) That person's home has been opened as an adoptive home.

(c) Any charitable organization or humane society incorporated under the laws of this state is qualified for appointment as guardian of the person and estate of a minor:

(1) When the major portion of the support of the minor is being supplied or administered by the organization;

(2) When the court finds that:

(A) The minor has been abandoned by his or her parents; or

(B) The minor's parents are incapacitated or unfit for the duties of guardianship; or

(3) If no other suitable person can be found who is able and willing to assume the duties of guardianship.

(d)(1) A parent under eighteen (18) years of age is qualified for appointment as guardian of the person of his or her child.

(2) If the Department of Human Services consents, the department is qualified for appointment as guardian of the estate of a minor when the minor is in the custody of the department.

(e)(1) A corporation authorized to do business in this state and properly empowered by its charter to become guardian is qualified to serve as guardian of the estate of an incapacitated person.

(2) A bank or similar institution with trust powers may be appointed guardian of the estate of an incapacitated person.

(f)(1) A nonresident natural person possessing the qualifications enumerated in this section, except as to residence, who has appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and has caused the appointment to be filed with the court, whether or not he or she has been nominated by the will of the last surviving parent of a minor resident of this state to be appointed as guardian of the minor, is qualified for the appointment.

(2) However, unless nominated by will, bond may not be dispensed with.

(g) A person whom the court finds to be unsuitable to perform the duties incident to the appointment shall not be appointed guardian of the person or estate of an incapacitated person.

(h) A sheriff, probate clerk of a circuit court, or deputy of either, or a circuit judge, shall not be appointed guardian of the person or estate of an incapacitated person unless the incapacitated person is related to him or her within the third degree of consanguinity.

(i)(1) Except as provided in subdivision (i)(4) of this section, a public agency or employee of any public agency acting in his or her official

capacity shall not be appointed as guardian for any incapacitated person.

(2) An employee of a public agency that provides direct services to the incapacitated person shall not be appointed guardian of the person or estate of the incapacitated person.

(3) An employee of a public agency that provides direct services to the incapacitated person shall not be appointed as a temporary guardian.

(4) Notwithstanding any other provision of law, the Public Guardian for Adults may serve as guardian of the person or the estate, or both, of an incapacitated person receiving services from any public agency.

(5) The department shall promulgate rules to implement this provision.

(j) A person may be appointed temporary guardian of an incapacitated person notwithstanding the provisions of subsection (h) or subsection (k) of this section if he or she is related to the incapacitated person within the third degree of consanguinity and the court determines that any potential conflict of interest is unsubstantial and that the appointment is in the best interest of the ward.

(k) A circuit court of this state shall not appoint a person or institution as the permanent custodian or permanent guardian of the person or estate of an adult in the custody of the department unless:

(1) The department has evaluated the prospective guardian under the department's authority under § 9-20-122 and promulgated department policy; or

(2) The department has evaluated the prospective custodian under the department's authority under § 9-20-122 and promulgated department policy.

**History.** Acts 1985, No. 940, § 8; A.S.A. 1947, § 57-827; Acts 1993, No. 416, § 1; 2003, No. 1185, § 280; 2007, No. 862, § 3; 2009, No. 301, § 2; 2011, No. 1027, § 2.

**A.C.R.C. Notes.** Acts 2007, No. 862, § 1, provided: "Legislative findings.

"The General Assembly finds that:

"(1) Many adults lack the capacity to provide informed consent to necessary health care, have not executed an advance health care directive or a durable power of attorney, and have no friend or family member qualified and willing to consent on their behalf; and

"(2) It is therefore necessary for the preservation of the public health and safety to provide for a public guardian who can make informed consent to needed medical and long-term care on behalf of incapacitated adults who are unable to

consent for themselves and for whom there is no other person qualified and willing to consent."

**Amendments.** The 2007 amendment added (h)(4) and redesignated former (h)(4) as present (h)(5).

The 2009 amendment, in (b), deleted "The Department of Human Services or" preceding "charitable organization" in the introductory language, and deleted "department or" following "administered by" in (b)(1); inserted (c)(2) and redesignated the remaining text accordingly; substituted "subdivision (h)(4)" for "subsection (b)" in (h)(1); and made related changes.

The 2011 amendment added (b); redesignated former (b) through (i) as present (c) through (j); inserted "or subsection (k)" following "subsection (h)" in present (j); and added (k).



## CASE NOTES

## ANALYSIS

Banks As Guardians.  
 Corporations as Guardians.  
 Requirements for Appointment.  
 Residence and Domicile.  
 Sheriffs as Guardians.  
 Stepchildren as Guardians.

**Banks As Guardians.**

In a guardianship and conservatorship action, the trial court did not abuse its discretion by appointing a bank as the ward's conservator because the ward was incompetent to handle her finances, and the appointment was proper pursuant to subdivision (d)(2) of this section. *Kuelbs v. Hill*, 2010 Ark. App. 427, — S.W.3d — (2010).

**Corporations as Guardians.**

A corporation was held not qualified to serve as guardian of the person. *Bogan v. Arkansas First Nat'l Bank*, 249 Ark. 840, 462 S.W.2d 203 (1971) (decision under prior law).

**Requirements for Appointment.**

Denial of paternal grandmother's petition for guardianship was affirmed because the grandmother did not meet the qualifications under subsection (a) of this section in that she failed to establish that she was not a convicted and unpardoned felon. *Bailey v. Maxwell*, 94 Ark. App. 358, 230 S.W.3d 282 (2006).

Court properly appointed an incapacitated person's brother, rather than her daughter, to be her guardian as the two had a loving brother and sister bond, they had a long history of working well in a business enterprise, and the brother had been a constant in the incapacitated person's life and had helped in providing for her care; further, the daughter had a long period of estrangement from her mother precipitated by her absconding to California with \$46,000 of her mother's money and, after she reentered her mother's life, she made it difficult for others to see her mother and made unfounded accusations of theft. *Martin v. Decker*, 96 Ark. App. 45, 237 S.W.3d 502 (2006).

Circuit court did not err in appointing a sister as guardian over her sibling, an incapacitated adult, without holding a hearing to determine the sister's qualifications or making specific factual findings regarding her suitability because the record did not indicate that the circuit court ever refused any request by the brother to hold an evidentiary hearing or issue findings of fact; nothing in this section mandates a hearing or specific factual findings on the question of a guardian's ability to serve, and no such requirements are set forth in § 28-65-210. *Kuelbs v. Hill*, 2010 Ark. App. 793, — S.W.3d — (2010).

**Residence and Domicile.**

A person who lived on an army post within the state of Arkansas was a resident within the meaning of former similar statute so as to be appointed guardian of an incompetent. *Metcalf v. Nichol*, 225 Ark. 574, 283 S.W.2d 853 (1955) (decision under prior law).

The use of the word "domicile" in former statute similar to § 28-65-202 showed that the legislature knew and appreciated the difference between residence and domicile in prescribing the qualifications of a guardian and intended only to require that a guardian be a resident. *Metcalf v. Nichol*, 225 Ark. 574, 283 S.W.2d 853 (1955) (decision under prior law).

**Sheriffs as Guardians.**

Prior to effective date of the 1949 Probate Code prohibiting a sheriff from acting as guardian of an incompetent, a probate court had the power to appoint a sheriff as a guardian of an incompetent person. *In re Wilson*, 216 Ark. 348, 225 S.W.2d 691 (1950) (decision under prior law).

**Stepchildren as Guardians.**

Where a stepfather stood in loco parentis to his stepdaughter and she in loco filiae to him, the stepdaughter was entitled to be appointed guardian of the stepfather who became senile. *Metcalf v. Nichol*, 225 Ark. 574, 283 S.W.2d 853 (1955) (decision under prior law).

**Cited:** *In re Pollock*, 293 Ark. 195, 736 S.W.2d 6 (1987).

**28-65-204. Preferences.**

(a) The parents of an unmarried minor, or either of them, if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person.

(b) Subject to this rule, the court shall appoint as guardian of an incapacitated person the one most suitable who is willing to serve, having due regard to:

(1) Any request contained in a will or other written instrument executed by the parent or by the legal custodian of a minor child for the appointment of a person as guardian of the minor child;

(2) Any request for the appointment of a person as his or her guardian made by a minor fourteen (14) years of age or over;

(3) Any request for the appointment of a person made by the spouse of an incapacitated person;

(4) The relationship by blood or marriage to the person for whom guardianship is sought.

(c) Prior to the appointment of a guardian, the court shall take into consideration any request made by the incapacitated person concerning his or her preference regarding the person to be appointed guardian. This request may be made to the court by any means, but there shall be no necessity that the incapacitated person appear before the court for the purpose of indicating his or her preference.

**History.** Acts 1985, No. 940, § 9; A.S.A. 1947, § 57-828; Acts 1991, No. 11, § 1.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L.J. Survey** — Family Law, 14 U. Ark. Little Rock L.J. 799.

**CASE NOTES****ANALYSIS**

Best Interest of Ward.

Change of Custody.

Child's Preference.

Parents.

Relatives Other Than Parent.

**Best Interest of Ward.**

The custody of a child was not awarded to gratify the feelings of either parent or with the idea of punishment or reward, but only from considerations for the best interests of the child. Page v. Page, 210 Ark. 430, 196 S.W.2d 580 (1946) (decision under prior law).

The harmful effect to young children of frequent changes in surroundings and en-

vironment could be entitled to controlling weight when, from the evidence, there is doubt as to what order should be made. Page v. Page, 210 Ark. 430, 196 S.W.2d 580 (1946) (decision under prior law).

Former statute did not make an ironclad order of priority where there was a dispute between relatives. It left it to the court to select that person as guardian, the appointment of whom would be for the best interests of the incompetent. McCartney v. Merchants & Planters Bank, 227 Ark. 80, 296 S.W.2d 407 (1956) (decision under prior law).

Since former statute gave no ironclad order of preference, a probate court did not abuse its discretion in the appointment of a bank as guardian of the person



and estate of an incompetent, having in mind the best interests of the ward, in view of a sharp dispute between relatives. *McCartney v. Merchants & Planters Bank*, 227 Ark. 80, 296 S.W.2d 407 (1956) (decision under prior law).

A reading of former similar statute indicated that parental preference was only one of many factors to be considered in determining the one most suitable to serve as guardian. The statute did not make an ironclad order of priority; instead, it left to the probate court's sound discretion the appointment of a guardian who would forward the best interests of the ward. *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982) (decision under prior law).

Former similar statute was couched in such terms as to allow a court to exercise its sound discretion and only granted a preference to the parents of a minor. Any inclination to appoint a relative as guardian of a minor child had to necessarily become subservient to the principle that the child's interest was of paramount consideration; the court needed only give due regard to those factors listed in the statute. *Bennett v. McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984) (decision under prior law).

Circuit court did not err in awarding guardianship in favor of the maternal grandparents over the biological father where the father never had custody and it was in the child's best interests to remain with his grandparents. *Freeman v. Rush-ton*, 360 Ark. 445, 202 S.W.3d 485 (2005).

Where maternal grandparents were appointed guardians of their grandson after the mother's death, the father's petition to terminate the guardianship was properly denied because (1) some of the father's testimony was found to be not credible and the father had a smoking habit and a previous domestic-battery incident, and (2) the statutory natural-parent preference under subsection (a) of this section was subservient to the best interest of the child. *Smith v. Thomas*, 373 Ark. 427, 284 S.W.3d 476 (2008).

Order appointing appellee guardian of the minor child was affirmed because, in guardianship matters, the natural-parent preference was but one consideration, which was subservient to the principle that the child's best interest was the paramount consideration. *Fletcher v. Scorza*,

2010 Ark. 64, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 170 (Mar. 18, 2010).

In guardianship proceedings for a child, a trial court's findings under subsection (a) of this section that an adoptive father was not qualified and suitable and staying in the adoptive father's custody would not be in the child's best interest were not clearly erroneous, as the adoptive father had never been the child's primary caregiver and had a long history of drug abuse. *Hicks v. Faith*, 2011 Ark. App. 330, — S.W.3d — (2011).

### **Change of Custody.**

In view of grandfather's advanced age and ability of mother to furnish better school facilities, order transferring child to mother's custody would not be disturbed. *Stone v. Crofton*, 156 Ark. 323, 245 S.W. 827 (1922) (decision under prior law).

Upon a proper and sufficient showing that a change in a decree awarding the custody of children would be for the best interest of the children, a chancery court may order the change. *Hamilton v. Anderson*, 176 Ark. 76, 2 S.W.2d 673 (1928) (decision under prior law).

Where after a divorce awarding the custody of a child to its father the parents were remarried, there was such a change in the circumstances of the parties as justified a court to award custody of the child to the mother. *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928) (decision under prior law).

A chancellor had the right to retain control of a case involving custody of a child and, if there were changes in the conditions which made it necessary to do so, could change the custody of the child. *Phifer v. Phifer*, 198 Ark. 567, 129 S.W.2d 939 (1939) (decision under prior law).

### **Child's Preference.**

Where the Arkansas Children's Home Society was appointed guardian of a dependent child under 14 years old, she was entitled to choose her own guardian when she reached the age of 14 years. *Arkansas Children's Home Soc'y v. Walker*, 146 Ark. 356, 225 S.W. 616 (1920) (decision under prior law).

In a contest between divorced parents over the custody of a 14-year-old daughter, the child's preference, while not controlling, could not be ignored, since, under

former statute, she could select her own guardian if she had no parents. *Patterson v. Cooper*, 163 Ark. 364, 258 S.W. 988 (1924) (decision under prior law).

An award of custody to the mother of a 14-year-old girl who was hostile to the father would not be disturbed. *Longinotti v. Longinotti*, 169 Ark. 1001, 277 S.W. 41 (1925) (decision under prior law).

In awarding the custody of children of the age of discretion, as between their divorced parents, the courts would consider their preference for the father and hostility toward the mother even if induced by the father's conduct. *Vilas v. Vilas*, 184 Ark. 352, 42 S.W.2d 379 (1931) (decision under prior law).

The preference of a child, while not controlling, should be taken into account. *Page v. Page*, 210 Ark. 430, 196 S.W.2d 580 (1946) (decision under prior law).

### Parents.

Though a mother is the natural guardian of her children when their father is dead, she is not entitled to the care and custody of their estate unless she gives bond and qualifies as their guardian. *Sparkman v. Roberts*, 61 Ark. 26, 31 S.W. 742 (1895) (decision under prior law).

Custody divided between parents. *Caldwell v. Caldwell*, 156 Ark. 383, 246 S.W. 492 (1923) (decision under prior law).

If a father who has the custody of a child in this state dies, the mother is entitled to the custody of the child, if a fit person, whether she resides in the state or not. *Hancock v. Hancock*, 197 Ark. 853, 125 S.W.2d 104 (1939) (decision under prior law).

In a habeas corpus proceeding by a nonresident mother for the custody of her minor child, that respondent had been appointed guardian of the child by the probate court was no defense if the mother was a fit person to have the custody and control of the child. *Hancock v. Hancock*, 197 Ark. 853, 125 S.W.2d 104 (1939) (decision under prior law).

A parent however poor and humble, if able to support the child in his own style of life, and who is of good moral character could not be deprived of the privilege by anyone no matter how brilliant the advantage he could offer. *Phifer v. Phifer*, 198 Ark. 567, 129 S.W.2d 939 (1939) (decision under prior law).

Evidence insufficient to show unfitness of mother to have custody. *Phifer v. Phifer*,

198 Ark. 567, 129 S.W.2d 939 (1939) (decision under prior law).

Custody awarded to mother in preference to grandmother. *Phifer v. Phifer*, 198 Ark. 567, 129 S.W.2d 939 (1939) (decision under prior law).

Custody awarded to natural mother in preference to stepmother. *Hancock v. Hancock*, 198 Ark. 652, 130 S.W.2d 1 (1939) (decision under prior law).

Custody awarded to mother rather than father. *Wimberly v. Wimberly*, 202 Ark. 461, 151 S.W.2d 87 (1941) (decision under prior law).

A chancellor, in awarding the custody of an infant or in modifying such an award subsequently, must keep in view the welfare of the child and should confide his custody to the parent most suitable therefor, the right of each parent to his custody being of equal dignity. *Kirby v. Kirby*, 189 Ark. 937, 75 S.W.2d 817 (1934); *Tilley v. Tilley*, 210 Ark. 850, 198 S.W.2d 168 (1946) (decisions under prior law).

The rights of parents are not proprietary and are subject to their related duty to care for and protect the child, and the law secures their preferential rights only so long as they discharge their obligations. In re Guardianship of Markham, 32 Ark. App. 46, 795 S.W.2d 931 (1990).

The preference found in this section does not automatically attach to a child's natural parent; only a natural parent who is both qualified and, in the opinion of the probate court, suitable must be preferred over all others to be the child's guardian. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

### Relatives Other Than Parent.

A sister had no statutory preference over the adopted son of an incompetent in the appointment of a guardian of the person and estate of the incompetent. *McCartney v. Merchants & Planters Bank*, 227 Ark. 80, 296 S.W.2d 407 (1956) (decision under prior law).

Evidence sufficient to support appointment of grandfather as guardian. *Monroe v. Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982) (decision under prior law).

Custody awarded to friends rather than grandparents. *Bennett v. McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984) (decision under prior law).

Trial court's decision to appoint the grandparents as guardians was clearly



erroneous where the evidence did not support a finding that the mother was an unfit parent; despite the fact that the grandparents may be able to provide certain advantages to the children, the mother should not be deprived of custody. *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004).

Court properly appointed an incapacitated person's brother, rather than her daughter, to be her guardian as the two had a loving brother and sister bond, they had a long history of working well in a business enterprise, and the brother had been a constant in the incapacitated person's life and had helped in providing for her care; further, the daughter had a long period of estrangement from her mother precipitated by her absconding to California with \$46,000 of her mother's money and, after she reentered her mother's life, she made it difficult for others to see her mother and made unfounded accusations of theft. *Martin v. Decker*, 96 Ark. App. 45, 237 S.W.3d 502 (2006).

Trial court properly found it was in a child's best interests to appoint a paternal aunt and uncle as guardians, in accordance with § 28-65-210, rather than the maternal grandfather, because even

though both parties satisfied the preferential status under subdivision (b)(4) of this section, any preferential status was subservient to the best interests analysis performed by the trial court; although the father was not qualified to be the guardian, the father wanted the child placed with the aunt and uncle. *Smith v. Lovelace*, 2011 Ark. App. 74, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 221 (Mar. 16, 2011).

Order appointing the mother's aunt and uncle guardian of the minor child was proper because the father's parents did not have standing to argue that the trial court erred in denying the father's motion to vacate; a U.S. Const. Amend. VI right to counsel was not cognizable in ordinary civil cases; § 28-65-207(a)(3) provided that notice need not be given to any person who actually appeared at the hearing; and there was no evidence that the trial court ignored the father's wishes, as required by subsection (b) of this section. *Light v. Duvall*, 2011 Ark. App. 535, — S.W.3d — (2011).

**Cited:** *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996); *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997).

## 28-65-205. Petition.

(a) Any person may file a petition for the appointment of himself or herself or some other qualified person as guardian of an incapacitated person.

(b) The petition shall state, insofar as can be ascertained:

(1) The name, age, residence, and post office address of the incapacitated person;

(2) The nature of incapacity and purpose of the guardianship sought in accordance with the classifications set forth in § 28-65-104;

(3) The approximate value and a description of the incapacitated person's property, including any compensation, pension, insurance, or allowance to which he or she may be entitled;

(4) Whether there is, in any state, a guardian of the person or of the estate of the incompetent;

(5) The residence and post office address of the person whom the petitioner asks to be appointed guardian;

(6) The names and addresses, so far as known or can be reasonably ascertained, of the persons most closely related to the incapacitated person by blood or marriage;

(7) The name and address of the person or institution having the care and custody of the incapacitated person;

(8) The names and addresses of wards for whom any natural person whose appointment is sought is already guardian;

(9) The reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment;

(10) A statement of the respondent's alleged disability;

(11) A recommendation proposing the type, scope, and duration of guardianship;

(12) A statement that any facility or agency from which the respondent is receiving services has been notified of the proceedings; and

(13) The names and addresses of others having knowledge about the person's disability.

**History.** Acts 1985, No. 940, § 10;  
A.S.A. 1947, § 57-829.

## CASE NOTES

### ANALYSIS

Appointment in Vacation.

Effect of Void Appointment.

Judgment Record.

Notice to Minors.

Only Physical Impairment Stated.

Presumption of Insanity.

### Appointment in Vacation.

The appointment of a guardian for an incompetent veteran confined in a state hospital for nervous diseases, made in vacation, but confirmed during term by an adopting order previously made, was not void. *Lingo v. Rainwater*, 199 Ark. 618, 136 S.W.2d 161 (1940) (decision under prior law).

### Effect of Void Appointment.

If an order appointing a guardian for an incompetent veteran was void, the person appointed would be an equitable or de facto guardian, a probate court's order approving his settlement would be void, and on appeal a circuit court would not have jurisdiction. *Lingo v. Rainwater*, 199 Ark. 618, 136 S.W.2d 161 (1940) (decision under prior law).

### Judgment Record.

Where an alleged incompetent was a citizen of the county in which a petition for appointment of guardian was filed and was confined in an out of state asylum and those matters were determined by the court, but through clerical misprision

were omitted from the recorded judgment, the judgment appointing the guardian was valid. *Sanders v. Omohundro*, 204 Ark. 1040, 166 S.W.2d 657 (1942) (decision under prior law).

### Notice to Minors.

Notice to a minor under 14 years of age of the appointment of his father as guardian was not essential to the validity of such an appointment. *Swindle v. Rogers*, 188 Ark. 503, 66 S.W.2d 630 (1934) (decision under prior law).

### Only Physical Impairment Stated.

Where the petition for appointment of a guardian merely stated that a person was unable to care for herself because of physical impairment, the probate court had no jurisdiction to appoint a guardian for such a person, at least under the law at the time of the guardianship proceeding. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979) (decision under prior law).

### Presumption of Insanity.

Where a petition for the appointment of a guardian of person committed to an insane asylum was filed, the probate court acquired jurisdiction to appoint a guardian, insanity was presumed from the fact of confinement in an asylum, and such proceeding was not a denial of due process. *Sanders v. Omohundro*, 204 Ark. 1040, 166 S.W.2d 657 (1942) (decision under prior law).

**Cited:** *Kuelbs v. Hill*, 2010 Ark. App. 427, — S.W.3d — (2010).



**28-65-206. Single guardianship for two or more incapacitated persons.**

When an application is made for the appointment of a guardian for two (2) or more incapacitated persons who are children of a common parent, or are parent and child or are husband and wife, it shall not be necessary that a separate petition, bond, or other paper be filed for each incompetent, and the guardianship of all may be considered as one (1) proceeding except that the guardian shall maintain and file separate accounts for the estates of each of his or her wards.

**History.** Acts 1985, No. 940, § 11;  
A.S.A. 1947, § 57-830.

**28-65-207. Notice of hearing for appointment.**

(a) Notice of the hearing for the appointment of a guardian need not be given to any person:

- (1) Who has signed the petition;
- (2) Who has in writing waived notice of the hearing, except the alleged incapacitated person may not waive notice;
- (3) Who actually appears at the hearing;
- (4) Whose existence, relationship to the alleged incapacitated person, or whereabouts is unknown and cannot by the exercise of reasonable diligence be ascertained;
- (5) Other than the alleged incapacitated person, whom the court finds to be beyond the limits of the continental United States or himself or herself incompetent; or
- (6) The alleged incapacitated person if the court finds that he or she is detained or confined by a foreign power or has disappeared.

(b) Except as provided in subsection (a) of this section, before the court shall appoint a guardian, other than a temporary guardian, notice of the hearing of the application for the appointment of the guardian shall be served upon the following:

- (1) The alleged incapacitated person if over fourteen (14) years of age, and the alleged incapacitated person shall be notified of his or her rights under § 28-65-213. This notice shall be served with the notice of hearing;
- (2) The parents of the alleged incapacitated person, if the alleged incapacitated person is a minor;
- (3) The spouse, if any, of the alleged incapacitated person;
- (4) Any other person who is the guardian of the person or of the estate of the alleged incapacitated person, or any other person who has the care and custody of the alleged incapacitated person, and the director of any agency from which the respondent is receiving services;
- (5) The Department of Human Services when the petition seeks appointment of a guardian who, at the time the petition is filed, serves as guardian of five (5) or more minor wards;

(6) If there is neither a known parent nor known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the alleged incapacitated person; and

(7) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward or his or her estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incompetent person; or

(C) Any other person designated by the court.

(c)(1) If the incapacitated person is over fourteen (14) years of age, there shall be personal service upon him or her if personal service can be had. Service on others may be had in any manner provided by § 28-1-112(b) or (e).

(2) The court, for good cause shown, may reduce the number of days of notice, but in every case at least twenty (20) days' notice shall be given.

(3) It shall not be necessary that the person for whom guardianship is sought be represented by a guardian ad litem in the proceedings.

**History.** Acts 1985, No. 940, § 12; A.S.A. 1947, § 57-831; Acts 1991, No. 163, § 2.

## CASE NOTES

### ANALYSIS

Appearance of Incompetent.  
Failure to Give Notice.  
Knowledge of Appointment.  
Presence at Hearing.  
Prohibition of Further Proceedings.  
Requirement.

### Appearance of Incompetent.

Proceedings for the appointment of a permanent guardian were not rendered invalid because of the lack of notice where the incompetent entered her appearance. *Lester v. Pilkinton*, 225 Ark. 349, 282 S.W.2d 590 (1955) (decision under prior law).

### Failure to Give Notice.

Where an original order appointing a guardian was void because it was issued without notice to the alleged incompetent and the guardianship was dismissed on a hearing on the merits, the guardian and his attorney could not be paid from the

estate of the alleged incompetent. *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950) (decision under prior law).

Order appointing the mother's aunt and uncle guardian of the minor child was proper because the father's parents did not have standing to argue that the trial court erred in denying the father's motion to vacate; a U.S. Const. Amend. VI right to counsel was not cognizable in ordinary civil cases; subdivision (a)(3) of this section provided that notice need not be given to any person who actually appeared at the hearing; and there was no evidence that the trial court ignored the father's wishes, § 28-65-204(b). *Light v. Duvall*, 2011 Ark. App. 535, — S.W.3d — (2011).

### Knowledge of Appointment.

Where the brother of an incompetent knew of the appointment of the incompetent's stepdaughter, who stood in loco filiae with incompetent, as his guardian and wrote for and received copies of reports of the probate court, approvals of the



probate court of first and second annual reports of guardian were not void because brother had not been served with formal copies of the reports. *Metcalfe v. Nichol*, 225 Ark. 574, 283 S.W.2d 853 (1955) (decision under prior law).

#### **Presence at Hearing.**

If a trial court exercised its discretion at an insanity hearing and barred an alleged incompetent from courtroom during part of the hearing, any abuse of such discretion was merely an error in exercise of jurisdiction, corrected only by appeal, and was not ground for granting a writ of injunction from further proceeding on a petition by the alleged incompetent. *Wilson v. Williams*, 215 Ark. 576, 221 S.W.2d 773 (1949) (decision under prior law).

Trial court at an insanity hearing had discretion in determining whether physical presence of an alleged incompetent was necessary at all times during the trial. *Wilson v. Williams*, 215 Ark. 576, 221 S.W.2d 773 (1949) (decision under prior law).

#### **Prohibition of Further Proceedings.**

An alleged incompetent was not entitled to a writ of prohibition against trial court from further proceedings in insanity hearing on the grounds that the sheriff was not a proper person to act as guardian and that evidence was not sufficient to support the finding of insanity, as the grounds alleged involved only mere errors reviewable only on appeal, and not by a writ of prohibition. *Wilson v. Williams*, 215 Ark. 576, 221 S.W.2d 773 (1949) (decision under prior law).

#### **Requirement.**

Notice to the alleged incapacitated person was required prior to the appointment of a guardian of the person and the estate where none of the exceptions in subsection (a) to the notice requirement applied and the appointment was not temporary. *Earle v. Bennett*, 289 Ark. 448, 711 S.W.2d 829 (1986).

**Cited:** *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996); *Finney v. Cook*, 351 Ark. 367, 94 S.W.3d 333 (2002).

### **28-65-208. Notice of other hearings.**

Whenever notice of a hearing in a guardianship proceeding is required, the notice shall be served upon the following who do not appear or in writing waive notice of hearing:

- (1) The guardian of the person;
- (2) The guardian of the estate; and
- (3) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward's estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or

(C) Any other person whom the court may designate.

**History.** Acts 1985, No. 940, § 13;  
A.S.A. 1947, § 57-832.

### **28-65-209. Request for special notice of hearings.**

(a)(1) At any time after the issuance of letters of guardianship, any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward's estate; or any

department, bureau, agency, or political subdivision of the United States or of this state, or any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or an interested person may serve, in person or by attorney, upon the guardian or upon his or her attorney and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he or she desires written notice of all hearings on petitions for:

(A) The settlements of accounts;

(B) The sale, mortgage, lease, or exchange of any property of the estate;

(C) An allowance of any nature payable from the ward's estate;

(D) The investment of funds of the estate;

(E) The removal, suspension, or discharge of the guardian or final termination of the guardianship; and

(F) Any other matter affecting the welfare or care of the incapacitated person and his or her property.

(2) The applicant for such a notice must include in his or her written request his or her post office address or that of his or her attorney.

(b) Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he or she designates in his or her request.

**History.** Acts 1985, No. 940, § 14;  
A.S.A. 1947, § 57-833.

## **28-65-210. Proof required for appointment of guardian.**

Before appointing a guardian, the court must be satisfied that:

(1) The person for whom a guardian is prayed is either a minor or otherwise incapacitated;

(2) A guardianship is desirable to protect the interests of the incapacitated person; and

(3) The person to be appointed guardian is qualified and suitable to act as such.

**History.** Acts 1985, No. 940, § 14;  
A.S.A. 1947, § 57-833.

## **CASE NOTES**

### **ANALYSIS**

In General.

Evidence.

Medical Testimony.

### **In General.**

Former similar statute required only that after it was found that a guardianship was desirable to protect the interests of a minor, the person to be appointed

guardian was qualified and suitable to act. *Lee v. Grubbs*, 269 Ark. 205, 599 S.W.2d 715 (1980) (decision under prior law).

Circuit court did not err in appointing a sister as guardian over her sibling, an incapacitated adult, without holding a hearing to determine the sister's qualifications or making specific factual findings regarding her suitability because the record did not indicate that the circuit court



ever refused any request by the brother to hold an evidentiary hearing or issue findings of fact; nothing in § 28-65-203 mandates a hearing or specific factual findings on the question of a guardian's ability to serve, and no such requirements are set forth in this section. *Kuelbs v. Hill*, 2010 Ark. App. 793, — S.W.3d — (2010).

### **Evidence.**

A child's grandparents, rather than her putative father, were properly appointed as guardians where, *inter alia*, (1) the grandparents owned their own home and were gainfully employed, (2) a home study established that their home was suitable and desirable and that they possessed the ability to care for the instant and future welfare and happiness of the child, and (3) they had contributed continual financial support to both the child and her mother, including the payment of prenatal care, cost of the birth, and hospital bills, whereas (4) the putative father was "in transition," as he had only been employed at his current job for one week prior to the hearing and did not have a home of his own, (5) there was no credible evidence to support his testimony that he had provided support for the child all of her life, and (6) there was credible evidence detailing his physical abuse of the child's mother, even while she was seven or eight months pregnant with the child. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

Denial of paternal grandmother's petition for guardianship was affirmed as the grandmother was unsuitable because she had been dishonest with the court. *Bailey v. Maxwell*, 94 Ark. App. 358, 230 S.W.3d 282 (2006).

In a guardianship case that awarded permanent guardianship to the grandparents, the mother took significant action towards rectifying any issues that would keep her from retaining custody of her son, including (1) maintaining a neat, clean, and appropriately furnished home; (2) taking steps to remedy most of the absence and tardiness issues by applying to an elementary school closer to her home and no longer working nights; (3) immediately and permanently removing wall art that could be deemed inappropriate and were an issue regarding her ability to care for her son; and (4) decreasing her Internet presence by removing most of the

pictures of her from the offending websites; those were the very types of improvements that parents were encouraged to make in the best interests of their child, and the mother should not be disparaged for her efforts to improve her home and her parenting skills. Thus, it was not in the child's best interests to take custody from the mother, who had rectified all issues related to her fitness, and grant custody to the child's grandparents; therefore, the circuit court clearly erred in removing the child from the mother's care and granting permanent guardianship to the grandparents. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 592 (Nov. 1, 2007), overruled, *Fletcher v. Scorza*, 2010 Ark. 64, — S.W.3d — (2010).

Where maternal grandparents were appointed guardians of their grandson after the mother's death, the father's petition to terminate the guardianship was properly denied because (1) some of the father's testimony was found to be not credible and the father had a smoking habit and a previous domestic-battery incident, and (2) the statutory natural-parent preference under § 28-65-204(a) was subservient to the best interest of the child. *Smith v. Thomas*, 373 Ark. 427, 284 S.W.3d 476 (2008).

Order appointing appellee guardian of the minor child was affirmed because, in guardianship matters, the natural-parent preference was but one consideration, which was subservient to the principle that the child's best interest was the paramount consideration; the circuit court was in a superior position to weigh and assess the credibility of witnesses, *Fletcher v. Scorza*, 2010 Ark. 64, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 170 (Mar. 18, 2010).

Trial court properly found it was in a child's best interests to appoint a paternal aunt and uncle as guardians, in accordance with this section, rather than the maternal grandfather, because even though both parties satisfied the preferential status under § 28-65-204(b)(4), any preferential status was subservient to the best interests analysis performed by the trial court; although the father was not qualified to be the guardian, the father wanted the child placed with the aunt and uncle. *Smith v. Lovelace*, 2011 Ark. App.

74, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 221 (Mar. 16, 2011).

Order appointing the mother's aunt and uncle guardian of the minor child was proper because the father's parents did not have standing to argue that the trial court erred in denying the father's motion to vacate; a U.S. Const. Amend. VI right to counsel was not cognizable in ordinary civil cases; § 28-65-207(a)(3) provided that notice need not be given to any person who actually appeared at the hearing; and there was no evidence that the trial court ignored the father's wishes, § 28-65-

204(b). *Light v. Duvall*, 2011 Ark. App. 535, — S.W.3d — (2011).

### Medical Testimony.

In a hearing on a petition to appoint a guardian for one alleged to be incompetent for other reasons than minority, the evidence had to include the oral testimony or sworn statement of at least one medical witness. *Sparks v. First Nat'l Bank*, 242 Ark. 435, 413 S.W.2d 865 (1967) (decision under prior law).

**Cited:** *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004); *Freeman v. Rush-ton*, 360 Ark. 445, 202 S.W.3d 485 (2005).

## 28-65-211. Determination of incapacity — Evidence required.

(a) The fact of minority, disappearance, or detention, or confinement by a foreign power shall be established by satisfactory evidence.

(b)(1) In determining the incapacity of a person for whom a guardian is sought to be appointed for cause other than minority, disappearance, or detention, or confinement by a foreign power, the court shall require that the evidence of incapacity include the oral testimony or sworn written statement of one (1) or more qualified professionals, whose qualifications shall be set forth in their testimony or written statements.

(2) If the alleged incapacitated person is confined or undergoing treatment in an institution for the treatment of mental or nervous diseases or in a hospital or penal institution, one (1) of the professionals shall be a member of the medical staff of that hospital or institution.

(3) The court, in its discretion, may require the presence before it of the person of the alleged incapacitated person.

(4) The court shall fix the fees to be paid to such examiners, which shall be charged as part of the costs of the proceeding.

(c) The costs of the proceeding shall be paid by the petitioner, who shall be reimbursed therefor out of the estate of the incapacitated person, if a guardian is appointed.

**History.** Acts 1985, No. 940, § 15; A.S.A. 1947, § 57-834.

## CASE NOTES

### ANALYSIS

Competency Established.  
Examination by Medical Witness.  
Examination Fees.  
Physical Impairment.

### Competency Established.

Where an incompetent brought a guardianship termination proceeding in which

she requested the trial court to adjudicate and restore her competency and the evidence clearly established that the plaintiff was competent to care for herself and her home and had done so for the previous 12 years, the trial court erred in refusing to grant her request because there was no evidence that she suffered from the requisite mental incapacity or unsoundness of



mind required to necessitate the appointment of a guardian, notwithstanding the fact that she was unable to properly manage her finances due to her inexperience in such matters. *In re Estate of Lemley*, 9 Ark. App. 140, 653 S.W.2d 141 (1983) (decision under prior law).

#### **Examination by Medical Witness.**

Nothing in the Probate Code required that the medical witnesses required under former similar statute must have examined an alleged incompetent. *Sparks v. First Nat'l Bank*, 242 Ark. 435, 413 S.W.2d 865 (1967) (decision under prior law).

Trial court's finding of incapacity was clearly erroneous because there was no oral testimony or sworn written statement of a qualified professional as required by subdivision (b)(1) of this section, and the medical evaluations did not establish findings with respect to adaptive behavior. *Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004).

#### **Examination Fees.**

Where original appointment of guardian without notice was invalid and guardianship was dismissed on hearing, so that no guardian was actually appointed, an examining physician was to be paid by the petitioner, and the petitioner was not entitled to reimbursement from the estate of alleged incompetent. *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950) (decision under prior law).

#### **Physical Impairment.**

Where the petition for appointment of the guardian merely stated that a person was unable to care for herself because of physical impairment, the probate court had no jurisdiction to appoint a guardian for such a person, at least under the law at the time of the guardianship proceeding. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979) (decision under prior law).

**Cited:** *In re Bailey*, 299 Ark. 352, 771 S.W.2d 779 (1989).

### **28-65-212. Evaluations.**

(a)(1) A professional evaluation shall be performed prior to the court hearing on any petition for guardianship except when appointment is being made because of minority, disappearance, detention, or confinement by a foreign power or pursuant to § 28-65-218.

(2) The evaluation shall be performed by a professional or professionals with expertise appropriate for the respondent's alleged incapacity.

(b) The evaluation shall include the following:

- (1) The respondent's medical and physical condition;
- (2) His or her adaptive behavior;
- (3) His or her intellectual functioning; and
- (4) Recommendation as to the specific areas for which assistance is needed and the least restrictive alternatives available.

(c)(1) If no professional evaluations performed within the last six (6) months are available, the court will order an independent evaluation.

(2) If the petition is granted, the cost of the independent evaluation will be borne by the estate of the incapacitated person. In the event the petition is denied, the costs will be borne by the petitioner.

(d)(1) The Department of Human Services shall not be ordered by any court, except the juvenile division of the circuit court, to gather records, investigate the respondent's condition, or help arrange for appropriate professional evaluations, unless the court has first determined all parties to the proceeding to be indigent and assistance provided by the department is limited to actions within the State of Arkansas.

(2) The department shall issue regulations to implement this provision.

(e) Any existing evaluations made by the department of which the court has notice must be considered by the court.

**History.** Acts 1985, No. 940, § 16; A.S.A. 1947, § 57-835; Acts 1987, No. 812, § 1; 2003, No. 368, § 1.

## CASE NOTES

### Evidence.

The evaluation set forth in this section is not required to be in writing, but in determining a person's incapacity the court must require that the evidence of incapacity include the oral testimony or sworn written statement of one or more qualified professionals. *In re Bailey*, 299 Ark. 352, 771 S.W.2d 779 (1989).

Finding of incapacity was clearly erroneous because it did not satisfy the requirements of subsection (b). *In re Bailey*, 299 Ark. 352, 771 S.W.2d 779 (1989).

Trial court's finding of incapacity was clearly erroneous because there was no oral testimony or sworn written statement of a qualified professional as required by § 28-65-211(b)(1) of this section, and the medical evaluations did not establish findings with respect to adaptive behavior. *Cogburn v. Wolfenbarger*, 85 Ark. App. 206, 148 S.W.3d 787 (2004).

**Cited:** *In re Evatt*, 291 Ark. 153, 722 S.W.2d 851 (1987); *Kuelbs v. Hill*, 2010 Ark. App. 427, — S.W.3d — (2010).

## 28-65-213. Hearing — Effect of determinations.

(a) At the hearing, the respondent shall have the right to:

- (1) Be represented by counsel;
- (2) Present evidence on his or her own behalf;
- (3) Cross-examine adverse witnesses;
- (4) Remain silent;
- (5) Be present; and

(6) Require the attendance by subpoena of one (1) or more of the professionals who prepared the evaluation.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of a proper disposition.

(c)(1) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.

(2) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action.

(3) If it is found that the respondent is substantially without capacity to care for himself or herself or his or her estate, a guardian for the person or estate, or both shall be appointed.

**History.** Acts 1985, No. 940, § 16; A.S.A. 1947, § 57-835.



CASE NOTES

**Substantially Without Capacity.**

Where court found that wife was clearly an incapacitated person, then even though husband was able to provide for her care, under subdivision (c)(3) a guard-

ian should have been appointed. *Deffenbaugh v. Estate of Claphan*, 48 Ark. App. 208, 893 S.W.2d 350 (1995).  
**Cited:** *In re Evatt*, 291 Ark. 153, 722 S.W.2d 851 (1987).

**28-65-214. Guardianship order.**

(a) A court order establishing a guardianship shall contain findings of fact that the respondent is an incapacitated person and is in need of a guardian for the person or estate, or both. The order may limit the power and duties of the guardian and may define the legal and civil rights retained by the incapacitated person.

(b) If satisfied that a guardian should be appointed, the court shall appoint one (1) or two (2) general or limited guardians of the person or estate, or both, but not more than one (1) guardian of the person shall be appointed unless they are husband and wife.

(c) The order shall specify the nature of the guardianship and the amount of the bond to be given.

(d) If the court determines the guardians should be limited, the order shall set forth the specific powers, authorities, and duties the guardian shall possess, which may be stated in terms of powers or rights the incapacitated person may exercise without intervention of the guardian.

(e) In defining the powers and duties of the guardian, the court shall consider the right of the incapacitated person to rely upon nonmedical remedial treatment in accordance with a recognized religious method of healing in lieu of medical care.

(f) In cases involving minor children, the order may make provisions for visitation and child support as in other cases involving child custody.

**History.** Acts 1985, No. 940, §§ 16, 17; A.S.A. 1947, §§ 57-835, 57-836; Acts 2003, No. 760, § 1.

CASE NOTES

ANALYSIS

Husband And Wife.  
Purpose of Bond.  
Specific Findings of Fact.

**Husband And Wife.**

Paternal grandfather could not be on the petition for guardianship with the paternal grandmother where it was revealed during the proceedings that the paternal grandmother and the paternal grandfather were not married. *Bailey v.*

*Maxwell*, 94 Ark. App. 358, 230 S.W.3d 282 (2006).

**Purpose of Bond.**

The purpose of a guardian's bond is to preserve the estate of the ward. *Bennett v. McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984) (decision under prior law).

**Specific Findings of Fact.**

The probate judge in a guardianship hearing was not required to make specific findings of fact as to why he did not give custody of minor children to the maternal

grandparents before he appointed friends of the family as permanent guardians. *Bennett v. McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984) (decision under prior law).

**Cited:** In re Evatt, 291 Ark. 153, 722 S.W.2d 851 (1987).

### 28-65-215. Bond of guardian.

(a) If the guardianship is to be of the person only, the amount of the bond shall not exceed one thousand dollars (\$1,000), or the court may dispense with the bond.

(b) At every accounting, the court shall inquire into the sufficiency of the bond and of the sureties, and, if either or both are found insufficient, the guardian shall be ordered to file a new or additional bond.

(c) If, by the terms of a will, the testator expresses the wish that no bond be required of the person whom he or she requests to be appointed guardian, that person may be relieved of giving a bond with respect to property given by the will to the incapacitated person.

(d) Section 28-48-201 et seq. with respect to the bonds of personal representatives shall be applicable to the bonds of guardians, except that in fixing the amount of the guardian's bond, the value of the real property, as distinguished from the income arising therefrom, unless it is sold, shall not be taken into consideration and shall not constitute property which may reasonably be expected to pass through the hands of the guardian.

(e) Further, when the ward's estate is all in cash, the court may dispense with the bond if the guardian deposits the entire estate on interest in a bank in Arkansas insured by the Federal Deposit Insurance Corporation or in a savings and loan association in Arkansas insured by the Federal Savings and Loan Insurance Corporation or in a credit union in Arkansas insured by the National Credit Union Administration and the value of the estate is not greater than the amount of the maximum insurance provided by law for a single depositor, and the bank or savings and loan association shall file with the probate clerk of the circuit court an agreement not to permit any withdrawal from the deposit except on authority of a circuit court order.

**History.** Acts 1985, No. 940, § 18; A.S.A. 1947, § 57-837; Acts 2003, No. 1185, § 281.

**Cross References.** Bonds not void for want of form, § 16-68-204.

### CASE NOTES

#### ANALYSIS

Purpose.  
Attorney's Fees.  
Order Without Bond.

Premium on Bond.

#### Purpose.

The purpose of a guardian's bond is to preserve the estate of the ward. *Bennett v.*



McGough, 281 Ark. 414, 664 S.W.2d 476 (1984) (decision under prior law).

**Attorney's Fees.**

Minor should have been allowed to recover attorney fees in his action against a bank because the action sounded in contract; the bank's obligations would not have arisen had it not entered into a contract with the minor's guardian to accept funds' deposit, albeit under the statutory conditions imposed by this section. *Jiles v. Union Planters Bank*, 90 Ark. App. 245, 205 S.W.3d 187 (2005).

**Order Without Bond.**

An order of a probate court authorizing a person to take charge of the property of an insane person as guardian without

bond was without authority and void on its face and was subject to collateral attack, and a deed of trust executed by the guardian was void. *Bank of Rector v. Parrish*, 131 Ark. 216, 198 S.W. 689 (1917) (decision under prior law).

**Premium on Bond.**

It not being doubted that under the provisions of former similar statute it was incumbent upon a guardian to give a bond when one was required by the court and it not being urged that one was not required, it had to be assumed that one was, and that being true, the ward's estate should have paid the premium. *Omohundro v. Patty*, 230 Ark. 252, 321 S.W.2d 746 (1959) (decision under prior law).

**28-65-216. Issuance of letters.**

(a) When a guardian has given such bond as may be required and the bond has been approved, as provided by § 28-48-205, or if no bond is required and the guardian has filed his or her written acceptance of his or her appointment, letters of guardianship under the seal of the court shall be issued to him or her.

(b) The letters, when so issued, until revoked or cancelled by the court, shall protect persons who, in good faith, act in reliance thereon.

**History.** Acts 1985, No. 940, § 19; A.S.A. 1947, § 57-838.

**CASE NOTES**

**Applicability.**

In a case where no bond was ever set and no letters of guardianship were ever issued, the Probate Code of 1949 did not authorize insurance company to pay guardian the proceeds on the strength of a court order conditionally appointing him

guardian, with bond yet to be determined, there was no error in the chancellor's ruling that insurance proceeds were improperly paid. *Prudential Ins. Co. of Am. v. Frazier*, 323 Ark. 311, 914 S.W.2d 296 (1996).

**28-65-217. Form of letters.**

(a) Letters of guardianship shall be in substantially the following form:

In the Circuit Court of ..... County, Arkansas.  
In the Matter of CD, an Incapacitated Person (a Minor)  
No. ....

**LETTERS OF GUARDIANSHIP**

Be it known that AB, whose address is ....., having been duly appointed guardian of the person and estate (person/estate) of CD, an

incapacitated person (a minor) and having qualified as such guardian, is hereby authorized to have the care and custody of and to exercise control over the person and to take possession of and administer the property (have the care and custody of and to exercise control over the person) (to take possession of and administer the property) of said incapacitated person (minor), as authorized by law.

Dated this .... day of .... , 20.....

.....  
 Probate Clerk of the Circuit Court of  
 ..... County, Arkansas.  
 (SEAL)

(b) If the powers, authorities, or duties of the guardian are limited, the letters shall state that fact, clearly and in bold print, by including the word **“limited”** in the title and by inserting the word **“limited”** between the words “duly” and “appointed” in the body of the letters.

**History.** Acts 1985, No. 940, § 20;  
 A.S.A. 1947, § 57-839; Acts 2003, No.  
 1185, § 282.

## 28-65-218. Temporary guardian.

(a)(1) Except as provided under subdivision (a)(2) of this section, if the court finds that there is imminent danger to the life or health of the incapacitated person or of loss, damage, or waste to the property of an incapacitated person and that this requires the immediate appointment of a guardian of his or her person or estate, or both, the court may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period, which period, including all extensions, shall not exceed ninety (90) days, and the court may remove or discharge him or her or terminate the guardianship.

(2)(A) If the incapacitated person is a minor, the initial period for the appointment of a temporary guardian shall be for a period not to exceed ninety (90) days.

(B)(i) However, on or before the expiration of the ninety-day period, the court may extend the temporary guardianship for an additional period not to exceed ninety (90) days if the court finds after a hearing on the merits that there remains imminent danger to the life or health of the minor if the temporary guardianship is not extended.

(ii) Notice of the hearing shall be given before the hearing as required by subsections (b)-(d) of this section. However, notice is not required with respect to a person whose whereabouts are unknown or cannot by the exercise of reasonable diligence be ascertained.

(b) Immediate notice of the temporary guardianship order shall be served by the petitioner upon the following:

- (1) The ward, if over fourteen (14) years of age;
- (2) The parents of the ward, if the ward is a minor;
- (3) The spouse, if any, of the ward;



(4) Any other person who is the guardian of the person or of the estate of the ward, or any other person who has the care and custody of the ward, and the director of any agency from which the respondent is receiving services;

(5) The Department of Human Services when the temporary guardian appointed serves as guardian of five (5) or more wards;

(6) If there is neither a known parent nor known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the ward; and

(7) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward or his or her estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incompetent; or

(C) Any other person designated by the court.

(c) The notice shall include:

(1) A copy of the petition;

(2) A copy of the temporary order and order of appointment;

(3) Notice of a hearing date; and

(4) A statement of rights as provided in § 28-65-207(b)(1).

(d) If the ward is over fourteen (14) years of age, there shall be personal service upon him or her if personal service can be had. Service on others shall be according to the Arkansas Rules of Civil Procedure or as otherwise provided by the court.

(e) Notice need not be given to any person listed in § 28-65-207(a)(1)-(6).

(f) Within three (3) working days of the entry of the temporary guardianship order, a full hearing on the merits shall be held.

(g) The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment.

(h) The temporary guardian shall make such reports as the court shall direct and shall account to the court upon termination of his or her authority.

(i) In other respects, the provisions of this chapter concerning guardians shall apply to temporary guardians, and an appeal may be taken from the order of appointment of a temporary guardian.

(j) The letters issued to a temporary guardian shall state the date of expiration of the authority of the temporary guardian.

**History.** Acts 1985, No. 940, § 21; A.S.A. 1947, § 57-840; Acts 1987, No. 535, § 1; 1993, No. 1295, § 1; 2011, No. 9, § 1.

**Amendments.** The 2011 amendment

inserted "Except as provided under subdivision (a)(2) of this section" in (a)(1); and added (a)(2).

## RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Legislative Survey, Family Law, 16 U. Ark. Little Rock L.J. 599. Ark. Little Rock L.J. 131.

## CASE NOTES

## ANALYSIS

Constitutionality.

Purpose.

Appointment Without Emergency.

Appointment Without Notice.

Court Costs and Fees.

Delay in Appointment.

Emergency Appointment.

Jurisdiction.

Length of Appointment.

Medical Evidence.

**Constitutionality.**

This section violates the due process clause of U.S. Const. Amend. 14 because it fails to provide for a safeguard hearing and meaningful notice of such a hearing. *In re Evatt*, 291 Ark. 153, 722 S.W.2d 851 (1987) (decision prior to 1987 amendment).

Since, in emergency situations, advance notice could defeat the purpose of this section because the incapacitated person, when given notice that a hearing was about to be held, might run away, or harm himself or herself or others, or waste his or her property before the hearing could be held, advance notice is not necessary to comply with procedural due process. *In re Evatt*, 291 Ark. 153, 722 S.W.2d 851 (1987) (decision prior to 1987 amendment).

A parent has a fundamental liberty interest in the care, custody, and management of his or her child. *Bynum v. Savage*, 312 Ark. 137, 847 S.W.2d 705 (1993).

**Purpose.**

Former similar statute was intended to take care of emergencies or instances where a delay could cause irreparable damage to the estate of an incompetent. *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962) (decision under prior law).

**Appointment Without Emergency.**

Where no emergency existed which would have necessitated the appointment of a temporary guardian, the doctor having stated that the incompetent's condi-

tion was improved, such an appointment was invalid as not complying with the statutory requisites of an emergency. *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962) (decision under prior law).

**Appointment Without Notice.**

Where there was no showing that a delay would cause irreparable damage to the estate of an incompetent, the appointment of a temporary guardian without notice permitted by former similar statute could not be justified. *Walthour-Flake Co. v. Brown*, 228 Ark. 307, 307 S.W.2d 215 (1957) (decision under prior law).

**Court Costs and Fees.**

Where a guardian was appointed without notice, but proceedings were not in conformity with former similar statute, and party was later held to be competent and guardianship dismissed, no temporary guardian was ever had, and petitioner could not recover court costs nor fees for guardian and attorney. *Powers v. Chisman*, 217 Ark. 508, 231 S.W.2d 598 (1950) (decision under prior law).

**Delay in Appointment.**

The fact that a period of 11 days elapsed between the fourth and fifth appointments of an individual for a 90-day period as a temporary guardian did not result in making the court's order valid, as such an appointment was contrary to the provisions of former similar statute. *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962) (decision under prior law).

**Emergency Appointment.**

In a guardianship case, the circuit court concluded that it had jurisdiction for the purpose of determining matters of the child's custody, and granted emergency temporary guardianship to the grandparents pursuant to this section; the circuit court reasoned that an emergency existed because (1) the mother's lifestyle created a risk of imminent danger to the child's life or health; and (2) the mother had abandoned care of the child on a number of occasions during her lifetime, and left the



child most recently with his grandparents. Thus, pursuant to § 9-19-204, the circuit court did not clearly err in finding that an emergency existed that warranted the circuit court's exercise of jurisdiction over the temporary emergency guardianship petition. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 592 (Nov. 1, 2007), overruled, *Fletcher v. Scorza*, 2010 Ark. 64, — S.W.3d — (2010).

In guardianship case, the circuit court did not clearly err in finding that an emergency existed which warranted the grant of temporary emergency guardianship to a child's grandparents based on (1) the mother's lifestyle and the child's health concerns; and (2) the fact that the mother left the child with his grandparents for the last seven and a half months. The circuit court felt it was in the child's best interest to remain with his grandparents until those issues could be further examined. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 592 (Nov. 1, 2007), overruled, *Fletcher v. Scorza*, 2010 Ark. 64, — S.W.3d — (2010).

#### **Jurisdiction.**

Circuit court had jurisdiction, pursuant to § 9-19-203, to determine matters involving the child's care, custody, and control and to determine both temporary and permanent guardianship because (1) Arkansas was the child's home state; (2)

neither the child, the mother, nor the grandparents had a significant connection to California, where the original custody decision was made; (3) there was no substantial evidence in California concerning the child's care, protection, training, and personal relationships; and (4) the California court declined to exercise continuing jurisdiction. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007), rehearing denied, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 592 (Nov. 1, 2007), overruled, *Fletcher v. Scorza*, 2010 Ark. 64, — S.W.3d — (2010).

#### **Length of Appointment.**

It was clearly the intent of the legislature in amending former similar statute to prohibit the appointment of a temporary guardian or the retention of an individual as temporary guardian for more than 90 days. *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962) (decision under prior law).

#### **Medical Evidence.**

It was error for a court to appoint a temporary guardian for one alleged to be incompetent by reason of mental incapacity "including habitual drunkenness and excessive use of drugs" on the testimony of a sister and a daughter without medical evidence. *Sparks v. First Nat'l Bank*, 242 Ark. 435, 413 S.W.2d 865 (1967) (decision under prior law).

**Cited:** *Earle v. Bennett*, 289 Ark. 448, 711 S.W.2d 829 (1986); *Trammell v. Isom*, 25 Ark. App. 76, 753 S.W.2d 281 (1988).

### **28-65-219. Substitution — Removal.**

(a) When a minor ward has attained fourteen (14) years of age, his or her guardian may be removed on petition of the ward to have another person appointed guardian if the court is satisfied that the person chosen is suitable, qualified, and competent and that it is for the best interest of the ward that such a person be appointed.

(b) A guardian may also be removed on the same grounds and in the same manner as provided in § 28-48-105 for the removal of a personal representative.

**History.** Acts 1985, No. 940, § 22; A.S.A. 1947, § 57-841.

## CASE NOTES

## ANALYSIS

Change of Custody.  
Grounds for Termination.  
Removal Order.

**Change of Custody.**

Before modification in a court order could be made, it had to be shown that, after the making of the original order, there had been such a change in the situation as to require, in the interest of the minor, the change to be made, or it had to be shown that material facts affecting the welfare of the child were unknown to the court when the first order was made. *Thompson v. Thompson*, 213 Ark. 595, 212 S.W.2d 8 (1948); *Smith v. Smith*, 213 Ark. 636, 212 S.W.2d 10 (1948) (decisions under prior law).

The fact that a mother was to marry a divorced man and move to Florida while an appeal was pending in the Florida courts concerning the validity of the divorce was no ground for changing custody of a child, there being no evidence of unfitness of the stepfather, since the divorce was granted by a court of competent jurisdiction and the second marriage would be *prima facie* legal. *Thompson v. Thompson*, 213 Ark. 595, 212 S.W.2d 8 (1948) (decision under prior law).

In awarding the custody of a minor child, or in modifying such an award, the chancellor had to keep in view primarily the welfare of the child. *Smith v. Smith*,

213 Ark. 636, 212 S.W.2d 10 (1948) (decision under prior law).

**Grounds for Termination.**

Where the evidence showed that two sisters' joint guardianship of a third sister's estate was marked by continual quarreling and bickering, the best interests of the ward demanded the termination of the guardianship, since the guardians in such circumstances were incapable of satisfactorily performing duties imposed upon them by law and the courts. *Omohundro v. Erhart*, 228 Ark. 910, 311 S.W.2d 309 (1958) (decision under prior law).

**Removal Order.**

An order of removal could not be set aside at subsequent term. *Haden v. Swepston*, 64 Ark. 477, 43 S.W. 393 (1897); *Wallace v. Swepston*, 74 Ark. 520, 86 S.W. 398 (1905) (decisions under prior law).

This section authorizes the removal of the guardian of an estate on the court's own motion, provided the removal order complies otherwise with this section's requirements. *In re Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995).

Ward's claim against a debtor, his former guardian, did not arise until after the ward had obtained an order in state court removing the debtor as guardian and the ward's claim thus arose post-petition and could not be incorporated into the debtor's proposed modified plan. *In re Heavener*, — B.R. —, 2008 Bankr. LEXIS 3575 (Bankr. E.D. Ark. Aug. 28, 2008).

**28-65-220. Successor guardian.**

When a guardian dies, is removed by order of the court, or resigns and the resignation is accepted by the court, the court may appoint another guardian in his or her place in the same manner and subject to the same requirements as are provided in this chapter for an original appointment of a guardian.

**History.** Acts 1985, No. 940, § 23; A.S.A. 1947, § 57-842.

## CASE NOTES

**Issue of Incompetency.**

The provisions of former similar statute that a successor guardian should be appointed in the same manner and be sub-

ject to the same requirements as were provided for an original appointment only referred to the guardian's qualifications, bond, and the like, and did not require



another determination of incompetency or require that the issue of incompetency be explored de novo. *Lester v. Pilkinton*, 225

Ark. 349, 282 S.W.2d 590 (1955) (decision under prior law).

**28-65-221. Standby guardians.**

(a) Without surrendering parental rights, any parent who is chronically ill or near death may have a standby guardian appointed by the court for the parent’s minor children using the same procedures outlined in this subchapter to establish a guardianship. The standby guardian’s authority would take effect as outlined in an order of standby guardianship, upon:

- (1) The death of the parent;
- (2) The mental incapacity of the parent; or
- (3) The physical debilitation and consent of the parent.

(b)(1) The standby guardian shall immediately notify the court upon the death, incapacity, or debilitation of the parent and shall immediately assume the role of guardian of the minor children.

(2) The court shall enter an order of guardianship in conformance with this section.

**History.** Acts 1999, No. 517, § 1.

**SUBCHAPTER 3 — POWERS AND DUTIES**

SECTION.

- 28-65-301. Duties of guardians generally.
- 28-65-302. Decisions requiring court approval.
- 28-65-303. Care, treatment, and confinement of ward.
- 28-65-304. Title and possession of estate.
- 28-65-305. Actions — Service of process.
- 28-65-306. Enforcement of contracts.
- 28-65-307. Continuation of business — Liability.
- 28-65-308. Power to borrow money, make gifts, etc.
- 28-65-309. Periodic allowances.
- 28-65-310. Support of minor ward.
- 28-65-311. Investments.
- 28-65-312. Retention of property and investment.

SECTION.

- 28-65-313. Purchase of home.
- 28-65-314. Sales, mortgages, etc., of property generally.
- 28-65-315. Oil, gas, and mineral interests — Sale, lease, etc.
- 28-65-316. Oil, gas, and mineral interests — Agreements for operation and development.
- 28-65-317. Payment of claims.
- 28-65-318. Compromise settlements.
- 28-65-319. Employment of professionals.
- 28-65-320. Accounting.
- 28-65-321. Inventory — Appraisalment.
- 28-65-322. Reports.
- 28-65-323. Administration of deceased ward’s estate.

**Effective Dates.** Acts 1997, No. 331, § 5: Mar. 3, 1997. Emergency clause provided: “It is hereby found and determined by the General Assembly that in enacting legislation prescribing the various categories of securities and accounts in which guardians may invest funds of wards, credit unions insured by the National

Credit Union Administration were inadvertently left out; that failure to include the insured credit unions as authorized depositories of such funds has created and continues to create a serious inequity and an unfair advantage for such credit unions; that this act is designed to eliminate this inequity and should be given

effect immediately. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Gov-

ernor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

### RESEARCH REFERENCES

**ALR.** Judgment in guardian's final accounting proceedings as *res judicata* in ward's subsequent action against guardian. 34 A.L.R.4th 1121.

**Am. Jur.** 39 Am. Jur. 2d, Guar. & W., § 93 et seq.

**Ark. L. Rev.** Leflar, Liberty and Death:

Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.

Brantley, Use of the Trust to Manage Property of the Elderly or Disabled, 42 Ark. L. Rev. 619.

**C.J.S.** 39 C.J.S., Guar. & W., § 51 et seq.

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### 28-65-301. Duties of guardians generally.

(a)(1) It shall be the duty of the guardian of the person, consistent with and out of the resources of the ward's estate, to care for and maintain the ward and, if he or she is a minor, to see that he or she is protected, properly trained and educated, and that he or she has the opportunity to learn a trade, occupation, or profession.

(2) The guardian of the person may be required to report the condition of his or her ward to the court, at regular intervals or otherwise, as the court may direct.

(3) The guardian of the person shall be entitled to the custody of the ward but shall not have the power to bind the ward or his or her property.

(b)(1) It shall be the duty of the guardian of the estate:

(A) To exercise due care to protect and preserve it;

(B) To invest it and apply it as provided in this chapter;

(C) To account for it faithfully;

(D) To perform all other duties required of him or her by law; and

(E) At the termination of the guardianship, to deliver the assets of the ward to the persons entitled to them.

(2) To the extent applicable, the law of trusts shall apply to the duties and liabilities of a guardian of the estate.

**History.** Acts 1985, No. 940, §§ 25, 26; A.S.A. 1947, §§ 57-844, 57-845; Acts 1999, No. 517, § 2.



## CASE NOTES

## ANALYSIS

Applicability.

Corporations as Guardians.

Due Care.

Duties of the Guardian of an Estate.

Interference in Adoption Proceedings.

Return of Child.

Tax Returns of Ward.

**Applicability.**

Circuit court properly interpreted subdivision (a)(3) of this section to mean that the asserted limitations were placed upon a guardian of a person only, and not the guardian of an estate, where the statute's plain language stated that the guardian of a person did not have the authority to bind the ward or his property. *Carmody v. Raymond James Fin. Servs.*, 373 Ark. 79, 281 S.W.3d 721 (2008).

**Corporations as Guardians.**

A corporation was held as unsuitable to perform the duties of a guardian for the person. *Bogan v. Arkansas First Nat'l Bank*, 249 Ark. 840, 462 S.W.2d 203 (1971) (decision under prior law).

**Due Care.**

Where the evidence showed that a ward went by her guardian's office each morning on her way to school and got small amounts in cash, ranging from 50 cents to a dollar, that she signed some receipts in blank, and that she did not receive the amounts shown in the several receipts, and that practically all of her estate was disposed of by the guardian in a little more than six months, there was not a substantial compliance with the "due care" provisions of former similar statute by the guardian. *Robinson v. Hammons*, 228 Ark. 329, 307 S.W.2d 857 (1957) (decision under prior law).

Where defendant also served as a co-executrix of her mother's estate, § 28-49-101(b)(2) permitted her to preserve and maintain real property in the estate, but where the title to the real property vested in defendant immediately on her mother's death, the circuit court erred in approving any expenditures for the property made after the mother's death. *Monk v. Griffin*, 92 Ark. App. 320, 213 S.W.3d 651 (2005).

Trial court did not clearly err in granting a mother's petition to replace a father

as guardian of their 21-year-old son, who had Williams syndrome, because the son needed a guardian who was vigilant in ensuring that his needs were met; there were several occasions where the father delayed or denied the son medical attention. *Hoffarth v. Harp*, 2009 Ark. App. 240, 303 S.W.3d 96 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 684 (May 6, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 575 (Sept. 10, 2009).

**Duties of the Guardian of an Estate.**

Chapter 7 debtors who were guardians of a creditor had a fiduciary responsibility to the creditor created by subdivision (b)(2) of this section and § 28-73-303, and the debtors committed defalcation as fiduciaries by failing to hold the creditor's estate as directed by a court order and by failing to account for estate funds. Any debt that resulted from the debtors' defalcation was therefore nondischargeable under 11 U.S.C.S. § 523(a)(4). *Anderson v. Sharp (In re Sharp)*, — B.R. —, 2008 Bankr. LEXIS 4270 (Bankr. E.D. Ark. Aug. 8, 2008).

Contract agreeing to binding arbitration did not violate public policy where the legislature had made clear in enacting this section that a guardian had a duty to invest the estate's funds and the circuit court properly found that the guardian had authority to execute account forms or client agreements necessary to deposit and invest estate funds. *Carmody v. Raymond James Fin. Servs.*, 373 Ark. 79, 281 S.W.3d 721 (2008).

**Interference in Adoption Proceedings.**

Where former similar statute gave the court appointed guardian the right of custody superior to that of the foster parents, and there was no allegation or proof that any of the prohibited acts were about to be performed by the guardian or the Commissioner of Arkansas Social Services, whom the foster parents sought to prevent from interfering with their adoption proceedings, the chancellor was in error when he issued an injunction against interference with the adoption proceedings of the foster parents. *Toan v. Falbo*, 268 Ark. 337, 595 S.W.2d 936 (1980) (decision under prior law).

**Return of Child.**

Where a grandmother was the guardian of an incompetent grandchild and the parents of the grandchild forcibly removed the child from the guardian to a location in Kentucky, it was proper for the court to order the return of the child to the grandparent, although she and her husband were over 80 years of age and deteriorating physically, where it was also shown that the father of the child was suffering from advanced stages of emphysema and an asthmatic condition and there was also evidence that the mother was hospitalized for significant health reasons on several

different occasions. *Mallory v. Edmondson*, 257 Ark. 909, 521 S.W.2d 215 (1975) (decision under prior law).

**Tax Returns of Ward.**

Probate courts were held to have the power to order a guardian of the person to surrender the tax returns of an incompetent ward over to the court for inspection by the guardian of the estate, as well as other parties to the litigation. *Ratterree v. White*, 277 Ark. 318, 642 S.W.2d 288 (1982) (decision under prior law).

**Cited:** *Brasel v. Estate of Harp*, 317 Ark. 379, 877 S.W.2d 923 (1994).

**28-65-302. Decisions requiring court approval.**

(a)(1) No guardian appointed prior to October 1, 2001, shall make any of the following decisions without filing a petition and receiving express court approval:

(A) Consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated;

(B) Consent to withholding life-saving treatment;

(C) Authorize experimental medical procedures;

(D) Authorize termination of parental rights;

(E) Prohibit the incapacitated person from voting;

(F) Prohibit the incapacitated person from obtaining a driver's license; or

(G) Consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

(2) No guardian appointed on or after October 1, 2001, shall make any of the following decisions without filing a petition and receiving express court approval:

(A) Consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated;

(B) Consent to withholding life-saving treatment;

(C) Authorize experimental medical procedures;

(D) Authorize termination of parental rights;

(E) Authorize an incapacitated person to vote;

(F) Prohibit the incapacitated person from obtaining a driver's license; or

(G) Consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

(b) However, the provisions of subdivision (a)(2) of this section shall not apply to written requests under § 20-17-214.

**History.** Acts 1985, No. 940, § 26; A.S.A. 1947, § 57-845; Acts 1999, No. 1536, § 7; 2001, No. 1689, § 1.



RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** Survey of      ssembly, Probate Law, 24 U. Ark. Little  
Legislation, 2001 Arkansas General As-      Rock L. Rev. 631.

CASE NOTES

ANALYSIS

Applicability.  
Change of Residence.  
Jurisdiction of Probate Courts.

**Applicability.**

A guardian is authorized to employ legal counsel in connection with the discharge of his duties, and the hiring of an attorney is not among those decisions made by a guardian that always requires prior court approval. *Johnson v. Guardianship of Ratcliff*, 72 Ark. App. 85, 34 S.W.3d 749 (2000).

Subdivision (a)(1)(G) of this section did not apply where the guardian, in signing the investment agreements, did not consent to a settlement or compromise, the claims subject to the arbitration agreement that the guardian had signed had

yet to be decided, and thus, no settlement or compromise existed. *Carmody v. Raymond James Fin. Servs.*, 373 Ark. 79, 281 S.W.3d 721 (2008).

**Change of Residence.**

Changing the ward's residence is not among the statutory list of guardian decisions that always require prior court approval. *King v. Beavers*, 148 F.3d 1031 (8th Cir. 1998), cert. denied, 525 U.S. 1002, 119 S. Ct. 513 (1998).

**Jurisdiction of Probate Courts.**

Probate courts are courts of limited and specific jurisdiction, and they have only the powers conferred by the Constitution or by statute or powers necessarily incidental to those specifically granted. *Arkansas Dep't of Human Servs. v. Estate of Hogan*, 314 Ark. 19, 858 S.W.2d 105 (1993).

**28-65-303. Care, treatment, and confinement of ward.**

(a)(1) If the ward is incapacitated for reasons other than minority and has not been committed to the state hospital as otherwise provided by law, the court, upon petition of the guardian of the person or other interested person and after such notice as the court shall direct, including notice to the guardian of the person if he or she is not the petitioner, may authorize or direct the guardian of the person to take appropriate action for the commitment of the ward to the state hospital or, while retaining control over and responsibility for the care of the person of the ward, to place the ward in some other suitable institution for treatment, care, or safekeeping.

(2) Upon petition of the guardian or other interested person, after a hearing of which the guardian of the person and such other persons as the court may direct shall have notice, the court, for good cause shown, may modify, amend, or revoke such an order.

(b) If the condition of the ward is such as to endanger the person or property of himself or herself or others, the guardian, in an emergency, may temporarily confine the ward in some suitable place or may deliver him or her into the custody of the sheriff for safekeeping in the county jail until such time as the court may hear and act upon a petition, which shall be promptly filed by the guardian, with reference to the commitment of the ward to the state hospital or for other appropriate provision for his or her treatment, care, or safekeeping.

**History.** Acts 1985, No. 940, § 26; A.S.A. 1947, § 57-845.

### CASE NOTES

#### **Custody of Hospital Authorities.**

Where hospital authorities rightfully received an insane person into their custody, a court would not require the absolute discharge from such custody, so long

as no steps were taken under former similar statute for his care and custody. *Ex parte Smith*, 167 Ark. 80, 266 S.W. 950 (1924) (decision under prior law).

### **28-65-304. Title and possession of estate.**

The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issue, and of the proceeds arising from the sale, mortgage, lease, or exchange thereof. Subject to the possession, the title to all the estate and to the increment and proceeds of the estate shall be in the ward and not in the guardian.

**History.** Acts 1985, No. 940, § 27; A.S.A. 1947, § 57-846.

**Cross References.** Taxes on lands, liability for, §§ 26-35-301, 26-35-401.

### CASE NOTES

#### ANALYSIS

Assignment Prior to Guardian.  
Authority over Realty.  
Broker's Commission.  
Improvements and Repairs.  
Tax Returns of Ward.

#### **Assignment Prior to Guardian.**

Where an automobile was assigned to another party prior to the time the party so assigning was put under guardianship, prior statutory provisions had no applicability and the guardian was not entitled to possession. *Parker v. Walrath*, 232 Ark. 585, 339 S.W.2d 121 (1960) (decision under prior law).

#### **Authority over Realty.**

A guardian could not buy adverse title. *Culberhouse v. Shirey*, 42 Ark. 25 (1883) (decision under prior law).

A guardian could not be authorized to exchange a ward's lands. *Rushing v. Horner*, 130 Ark. 21, 196 S.W. 468 (1917) (decision under prior law).

#### **Broker's Commission.**

Where a guardian employed a broker to sell a ward's realty, the sale was upon the order and approval of a probate court, and the services were beneficial to the ward's

estate, the ward's estate was liable for a commission since a guardian had a right to employ the services of a competent real estate agent to assist in the sale of a ward's property. *Gordon v. Burns*, 203 Ark. 13, 155 S.W.2d 588 (1941) (decision under prior law).

#### **Improvements and Repairs.**

A guardian was held to be the authorized agent appointed by law to take care of and manage his ward's estate; if the estate consisted of land, it was his duty to collect the rents and profits and, to this end, keep the premises in tenable condition. A guardian could not, without an order of court, make expensive permanent improvements; however, when a guardian made necessary and proper repairs, he should have been allowed credit in his settlement for money so advanced. *Waldrip v. Tulley*, 48 Ark. 297, 3 S.W. 192 (1887) (decision under prior law).

#### **Tax Returns of Ward.**

Probate Courts have the power to order a guardian of the person to surrender the tax returns of an incompetent ward over to the court for inspection by the guardian of the estate, as well as other parties to the litigation. *Ratterree v. White*, 277 Ark. 318, 642 S.W.2d 288 (1982).



### 28-65-305. Actions — Service of process.

(a) When there is a guardian of the estate, all actions between the ward or the guardian and third persons in which it is sought to charge or to benefit the estate of the ward shall be prosecuted by or against the guardian of the estate as guardian, and the guardian shall represent the interests of the ward in the action.

(b) In every case, process shall be served upon the guardian of the estate and in addition upon such other persons as by law required.

**History.** Acts 1985, No. 940, § 28; A.S.A. 1947, § 57-847.

**Cross References.** Right to bring action, § 16-61-101 et seq.

### CASE NOTES

#### ANALYSIS

Compromise of Suit.

Proper Party.

Recovery of Minor's Property.

Ward as Witness.

#### Compromise of Suit.

A guardian could not compromise a ward's suit without the sanction of a probate court. *Rankin v. Schofield*, 70 Ark. 83, 66 S.W. 197, 70 S.W. 306 (1902) (decision under prior law).

#### Proper Party.

Because plaintiff individual was not the proper party to pursue the tort claims against defendants due to her incompetency, and she did not move to substitute the proper party after being put on notice of the need for substitution, the district court did not err in dismissing the claims. *Kuelbs v. Hill*, 615 F.3d 1037 (8th Cir. 2010).

#### Recovery of Minor's Property.

Where a parent brought a suit in his own name to recover a horse alleged to

belong to his infant son, it was not error to refuse to permit him to amend the complaint to allege a cause of action in favor of the son by the plaintiff as his natural guardian, as the proposed amendment would have the effect of bringing a new cause of action. *Irby v. Dowdy*, 139 Ark. 299, 213 S.W. 739 (1919) (decision under prior law).

#### Ward as Witness.

Where a probate court appointed a guardian for an elderly lady upon the finding that she "was suffering from hypertension, arteriosclerosis and cardiovascular disease and was not physically able to see after her large number of rent houses and farm property," this finding did not preclude her from testifying in an action brought by her guardian when she appeared to be in full control of her mental faculties when she appeared in court. *Parker v. Walrath*, 232 Ark. 585, 339 S.W.2d 121 (1960) (decision under prior law).

### 28-65-306. Enforcement of contracts.

(a) When, prior to his or her incapacity, an incapacitated person has entered into a valid contract for the purchase or sale of any interest in real or personal property, including the sale or relinquishment of a dower or homestead interest, and the contract has not been performed prior to the inception of incapacitation, the court, upon petition of the guardian, the seller or purchaser, or other interested person, if it finds that performance of the contract would have been required on the part of the incapacitated person if the incapacitation had not intervened, may authorize the guardian to complete the performance of the contract and to execute or join in the execution of the deed of conveyance, bill of

sale, or other appropriate instrument in the name and in behalf of the incapacitated person pursuant to the terms of the original contract.

(b) The conveyance, bill of sale, or other instrument shall have the same effect with respect to the estate, title, or interest of the incapacitated person as if executed by him or her personally while incapacitated.

**History.** Acts 1985, No. 940, § 29;  
A.S.A. 1947, § 57-848.

## CASE NOTES

### ANALYSIS

Assignment Prior to Guardianship.  
Instrument Affecting Homesteads.  
Testimony of Ward.

#### **Assignment Prior to Guardianship.**

Where an automobile was assigned to another party prior to the time the party so assigning was put under guardianship, there was a completed gift and former similar statute had no application. *Parker v. Walrath*, 232 Ark. 585, 339 S.W.2d 121 (1960) (decision under prior law).

#### **Instrument Affecting Homesteads.**

The provisions of § 18-12-403 declaring that no instrument affecting homestead is

valid unless signed by wife was held applicable also to an insane wife not under guardianship, since § 18-12-403 has never been amended or repealed. *Penney v. Vessells*, 221 Ark. 389, 253 S.W.2d 968 (1952) (decision under prior law).

#### **Testimony of Ward.**

It was proper for a trial court to dismiss a complaint filed in the name of a ward by the guardian of the estate on testimony presented in court by the ward. *Parker v. Walrath*, 232 Ark. 585, 339 S.W.2d 121 (1960) (decision under prior law).

## **28-65-307. Continuation of business — Liability.**

(a) If, at the time of the appointment of a guardian of the estate, the ward owns a business or an interest in a business, the court, by appropriate order, may authorize the guardian to continue the conduct of or participation in such a business in behalf of the ward for such periods of time and subject to such safeguards as the court may find to be for the best interest of the ward.

(b) The ward's estate, but not the guardian personally, shall be liable for damages resulting from torts or other acts committed by agents and employees of the guardian in the course of their employment in the conduct of the business.

(c) It is specifically recognized that the operation of any business undertaking involves hazards, chance, and danger of loss. In recognition of this fact, it is declared to be the legislative intent that no guardian shall be held personally liable for loss resulting from mere lack of familiarity with the business operations, mistakes of judgment made in good faith, or like causes.

**History.** Acts 1985, No. 940, § 30;  
A.S.A. 1947, § 57-849.



### 28-65-308. Power to borrow money, make gifts, etc.

(a) Upon a showing that the action would be advantageous to the ward and his or her estate, the court may authorize the guardian to borrow money, to execute notes and other legal evidences of indebtedness, and to mortgage property of the ward in accordance with the provisions of § 28-65-314.

(b) Upon a showing that the action would be advantageous to the ward and his or her estate, the court may authorize the guardian to make gifts and disclaimers on behalf of the ward.

**History.** Acts 1985, No. 940, § 31;  
A.S.A. 1947, § 57-850.

### CASE NOTES

#### ANALYSIS

Obligations Generally.  
Schooling of Wards.

#### Obligations Generally.

The word "obligation" was used in former statute in the sense of liability either created by contract or by operation of law. *Phillips v. Phillips*, 203 Ark. 481, 158

S.W.2d 20 (1942) (decision under prior law).

#### Schooling of Wards.

Guardians were authorized to execute valid mortgages on their ward's lands for educational purposes. *Rightsell v. Carpenter*, 188 Ark. 21, 64 S.W.2d 101 (1933) (decision under prior law).

### 28-65-309. Periodic allowances.

(a) The guardian of the estate, or any person, department, bureau, agency, or charitable organization having the care and custody of a ward may apply to the court for an order directing the guardian of the estate to pay to the person, department, bureau, agency, or charitable organization having the care and custody of the ward or, if the guardian of the estate has the care and custody of the ward, directing the guardian of the estate to apply a designated amount periodically as the court may direct, to be extended for the care, maintenance, and education of the ward and of his or her dependents.

(b) In proper cases the court may order payment of amounts directly to the ward for his or her maintenance or incidental expenses.

(c) The amounts authorized under this section may be decreased or increased from time to time by direction of the court.

(d) If payments are made to another under the order of the court, the guardian of the estate is not bound to see to the application of the payments.

**History.** Acts 1985, No. 940, § 33;  
A.S.A. 1947, § 57-852.

## CASE NOTES

## ANALYSIS

Approval for Personal Needs.  
Child Reaching Majority.  
Credit for Living Expenses.  
Effect of Guardian's Erroneous Belief.  
Expenditures Without Court Order.  
Ratification of Payments.

**Approval for Personal Needs.**

There could be no valid objection to a court's approval of the payment of approximately \$15.00 per month to a hospital to be used for a ward's personal needs pursuant to the provisions of former similar statute. *Omohundro v. Patty*, 230 Ark. 252, 321 S.W.2d 746 (1959) (decision under prior law).

**Child Reaching Majority.**

Once a child reaches majority and is physically and mentally normal, the legal duty of the parents to support that child ceases; that duty cannot be reimposed later if the adult child becomes disabled and needs support. *Towery v. Towery*, 285 Ark. 113, 685 S.W.2d 155 (1985) (decision under prior law).

**Credit for Living Expenses.**

Where a widow was appointed administrator of her husband's estate as well as guardian for his minor children and made no regular reports of her administration and her guardianship, but it was an undisputed fact that she and her wards had their living out of the income of the land, which was all of the estate, and this was barely sufficient, though expenditures were made without an order of the probate court, she was entitled to have credit for the living expenses of the wards not exceeding the clear income of the rents

and the actual value of the necessities furnished. *Shell v. Sheets*, 202 Ark. 708, 152 S.W.2d 301 (1941) (decision under prior law).

**Effect of Guardian's Erroneous Belief.**

Where a mother erroneously concluded that a minor's marriage emancipated him and that his signed receipt cleared her of liability as his guardian with respect to the father's estate, although the minor was not bound by the signed receipt, and the guardian, before expending the corpus, failed to obtain prior authorization and to file regular reports of expenditures, as required by law, a probate court could properly apply such charges against the minor's claim against his mother-guardian's estate. *Shinley v. Ricks*, 234 Ark. 767, 354 S.W.2d 547 (1962) (decision under prior law).

**Expenditures Without Court Order.**

A trial court had the power and authority to allow a guardian credit for various amounts expended out of corpus of a ward's estate for maintenance and education of the ward without a prior probate court order to make such expenditures. *Robinson v. Hammons*, 228 Ark. 329, 307 S.W.2d 857 (1957) (decision under prior law).

**Ratification of Payments.**

Where a guardian paid himself \$338 from a ward's estate without prior court approval, a probate court was justified in allowing such a claim as a credit where the ward ratified the payment after coming of age. *Robinson v. Hammons*, 228 Ark. 329, 307 S.W.2d 857 (1957) (decision under prior law).

**28-65-310. Support of minor ward.**

(a) The support of their unmarried minor children is chargeable jointly and severally upon the property of the husband and the property of the wife, and in the relation thereto, they may be sued either jointly or severally.

(b) Although the responsibility for the care, maintenance, and education of a minor rests upon his or her parents or persons in loco parentis, if there are such persons, nevertheless in appropriate cases and taking into consideration the relative resources and circumstances of a parent and the minor ward, the court, in its discretion, may



authorize the guardian of the estate to expend income or principal of the ward's estate for the ward's care, maintenance, and education.

(c)(1) As far as necessary for the purpose, except as provided in subsection (b) of this section, the income of the ward's estate shall be first applied to his or her care, maintenance, and education.

(2) On order of the court, any surplus of the income may be applied to the care, maintenance, and education of the dependents of the ward.

(3) If the income is not sufficient to care for, maintain, and educate the ward and his or her dependents, the court may order the expenditure of such portion of the principal as it from time to time finds necessary for such purposes.

**History.** Acts 1985, No. 940, § 34; state Family Support Act, § 9-17-101 et seq.  
A.S.A. 1947, § 57-853.

**Cross References.** Uniform Inter-

## CASE NOTES

### ANALYSIS

Duty of Parent.

Expenditures Without Court Order.

Failure to Support.

Funeral of Ward's Parent.

Invasion of Principal.

Jurisdiction.

Obligation of Mother.

Purchase of House.

Relieved from Support.

### Duty of Parent.

A parent had the obligation to support a minor child, and no request for support was necessary. *Dangelo v. Neil*, 10 Ark. App. 119, 661 S.W.2d 448 (1983) (decision under prior law).

### Expenditures Without Court Order.

While a trial court had authority under former similar statute to allow credits to a guardian for expenditures from the corpus of a ward's estate though it was not authorized by a previous court order, a guardian making such expenditures did so at his own risk. *Robinson v. Hammons*, 228 Ark. 329, 307 S.W.2d 857 (1957) (decision under prior law).

### Failure to Support.

A parent had to furnish the support and maintenance for his child himself and the duty was a personal one; the parent could not rely upon the assurance that someone else was properly supporting and maintaining the child to avoid the impact of § 9-9-207 providing for adoption of his

child without his consent because of his failure to support the child. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979) (decision under prior law).

Although a father had failed significantly for a period of one year to support his child without justifiable cause, that fact did not preclude him from objecting to a proposed adoption or from being fully heard in the matter; rather, it meant that he could not defeat the adoption by simply withholding his consent. *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ct. App. 1980) (decision under prior law).

### Funeral of Ward's Parent.

A guardian was required to obtain a court order before paying for the funeral of a ward's father out of ward's money. *Russell v. Johnson*, 193 Ark. 541, 101 S.W.2d 172 (1937) (decision under prior law).

### Invasion of Principal.

A guardian had no authority to invade the principal of his ward's estate without first obtaining an order of a probate court. *Campbell v. Clark*, 63 Ark. 450, 39 S.W. 262 (1897); *Hudson v. Newton*, 83 Ark. 223, 103 S.W. 170 (1907); *France v. Shockey*, 92 Ark. 41, 121 S.W. 1056 (1909); *Thomas v. Thomas*, 126 Ark. 579, 191 S.W. 227 (1917); *Diffie v. Anderson*, 137 Ark. 151, 208 S.W. 428 (1919) (decisions under prior law).

### Jurisdiction.

The circuit court's power to review and conclude, subject to appeal, whether the

money is “accessible”, under whatever state or federal regulations may apply, does not mean that the circuit court has the authority to determine how a guardian is to use a ward’s funds; that decision lies exclusively within the jurisdiction of the probate court according to § 28-65-107(a). Another provision subdivision (c)(3) of this section, deals with the probate court’s authority to invade the principal of a minor ward’s estate to provide for support. In re Porter, 298 Ark. 121, 765 S.W.2d 944 (1989).

#### **Obligation of Mother.**

A mother’s obligations to her child for support did not come into existence only when the father was impoverished. Barnhard v. Barnhard, 252 Ark. 167, 477 S.W.2d 845 (1972) (decision under prior law).

An agreement by the mother to pay child support to her husband following a divorce was not invalid as being inequitable and contrary to public policy on the grounds that the agreement relieved the

father of his obligation to support his children, since the obligation belonged to both parents. Barnhard v. Barnhard, 252 Ark. 167, 477 S.W.2d 845 (1972) (decision under prior law).

#### **Purchase of House.**

A probate court had power to authorize the guardian of a mentally incompetent veteran to purchase a house for the ward and his dependent family and pay for the house out of the proceeds of the ward’s estate. United States Fid. & Guar. Co. v. Chambers, 204 Ark. 81, 160 S.W.2d 888 (1942) (decision under prior law).

#### **Relieved from Support.**

Where a provision in divorce decree for daughter’s support until she became employed and self-supporting was contractual and father actually supported her past her majority, her refusal to accept employment offered, which would have made her self-supporting, relieved the father from further support. Worthington v. Worthington, 207 Ark. 185, 179 S.W.2d 648 (1944) (decision under prior law).

### **28-65-311. Investments.**

(a) The guardian of the estate may, and when ordered by the court shall, deposit as a fiduciary, the funds of the ward in a financial institution of this state, as a general deposit, either in a checking account or a savings account.

(b) The guardian shall invest the funds of the ward not reasonably needed for the ward’s care, maintenance, or education in securities selected by the guardian from among the following categories:

(1) Bonds, notes, or certificates of indebtedness which are the direct obligations of, or the principal and income of which are unconditionally guaranteed by, the United States;

(2) Bonds or notes issued by the State of Arkansas;

(3) Arkansas State Board of Education bonds issued under Acts 1937, No. 162 [repealed];

(4) Bonds issued by a county, city, incorporated town, or improvement district of the State of Arkansas, whether the bonds are the general obligation of the issuer or are payable out of a special fund, as long as the bonds are negotiable instruments under the law;

(5) Bonds issued by a school district of the State of Arkansas;

(6)(A) Shares, share accounts, or accounts of any building and loan association organized under the laws of the State of Arkansas, of any federal savings and loan association domiciled in the State of Arkansas which are insured by the Savings Association Insurance Fund, or of any credit union in Arkansas, for their eligible members, which are insured by the National Credit Union Administration.



(B) However, no such investment shall exceed the amounts so insured.

(C) Provided, nothing herein shall be construed to expand the field of membership of any credit union;

(7) Notes, bonds, debentures, or other similar obligations issued by federal land banks, federal intermediate credit banks, or banks for cooperatives, or any other obligations issued pursuant to the provisions of an Act of Congress of the United States known as the Farm Credit Act of 1971 and acts amendatory thereto;

(8) Bonds issued by a national mortgage association;

(9) Notes or bonds secured by mortgage or deed of trust which the Federal Housing Administration has insured or has made a commitment to insure;

(10) Notes or bonds secured fully as to principal and interest by a first mortgage or deed of trust upon improved or timbered real property located in the State of Arkansas in which provision is made for regular periodic payments on the principal, at least annually, sufficient in amount to amortize the indebtedness during a period not exceeding fifteen (15) years. These notes or bonds are to be in an amount not exceeding sixty-five percent (65%) of the value of the real property security as determined by an appraisal thereof approved by the court;

(11) Bonds, notes, debentures, or other direct obligations of a state, county, or city located without the State of Arkansas but within the United States, or of a corporation incorporated under the laws of the United States or of any state of the United States or of the District of Columbia which, at the time of the purchase, shall be rated in either the highest or next-highest classification established by at least two (2) nationally recognized standard financial rating services;

(12) Shares of any open-end or closed-end management-type investment company or investment trust registered under the Investment Company Act of 1940, as amended, the portfolio of which is limited to the securities described in subdivisions (b)(1)-(11) of this section and to repurchase agreements fully collateralized by such securities, provided that the investment company or investment trust takes delivery of the collateral either directly or through an authorized custodian;

(13) Contracts for annuities or for life, health, or accident insurance on the person of the ward, or of another in whom the ward has an insurable interest, or a combination of any such contracts, if the contract is payable to the ward or to his or her estate, is in the usual form, and is issued by an insurance company authorized to do business in the State of Arkansas. Any such contract shall reserve the right in the ward to change the beneficiary thereof after the termination of his or her incompetency; or

(14) Shares or interests in any common trust fund investing in common stocks or preferred stocks listed on a national securities exchange maintained by a guardian which is a state or national bank or trust company authorized by the provisions of §§ 28-69-201 — 28-69-204 to establish and maintain common trust funds.

(c)(1) Without prior order of the court, no investment shall be made, other than an investment in:

(A) Direct obligations of, or obligations unconditionally guaranteed as to principal and income by, the United States;

(B) Bonds issued by the State of Arkansas; or

(C) Shares of any investment company or investment trust described in subdivision (b)(12) of this section, the portfolio of which is limited to the securities described in subdivisions (c)(1)(A) and (B) of this section and to repurchase agreements fully collateralized by such securities, provided that the investment company or investment trust takes delivery of the collateral either directly or through an authorized custodian.

(2) The court shall not approve an investment in an issue of securities which has been in default for a period exceeding one hundred twenty (120) days during the five (5) years next preceding the investment.

(d) If the guardian of the estate is a state or national bank or trust company authorized by the provisions of §§ 28-69-201 — 28-69-204 to establish and maintain common trust funds and if the guardian has established and is maintaining such a common trust fund which, by the terms of the instrument creating it, limits the purchase of investments for such funds to investments authorized in this chapter, the guardian may invest the ward's funds in participation in the common trust fund without prior order of the court.

**History.** Acts 1985, No. 940, § 35; A.S.A. 1947, § 57-854; Acts 1989, No. 658, §§ 1, 2; 1991, No. 347, § 1; 1997, No. 331, § 1.

**U.S. Code.** The Farm Credit Act of 1971, referred to in this section, is codified primarily as 12 U.S.C. § 2001 et seq.

The Investment Company Act of 1940, referred to in this section, is codified primarily as 15 U.S.C. § 80a-1 et seq.

**Cross References.** Prudent investor rule for investments, § 28-71-105.

## CASE NOTES

### ANALYSIS

Charging of Interest.  
Compounding Interest.  
Errors or Mistakes.  
Inability to Make Loans.  
Insufficient Security.  
Investments Authorized.  
Lending Without Court Approval.  
Savings Bonds.

### Charging of Interest.

Where a guardian, after being ordered by a probate court to lend out his ward's money, waited for 10 years without lending the money and without making any reports to the court of his failure to do so,

it was not error, after allowing him reasonable time to make the loan after being ordered to do so, to charge him with interest thereafter at the legal rate. *Merritt v. Wallace*, 76 Ark. 217, 88 S.W. 876 (1905) (decision under prior law).

### Compounding Interest.

Section 4-57-101(c) was held to have no applicability to cases in which fiduciaries, upon equitable principles, became chargeable with compound interest, and probate courts had the same discretion to compound interest as to fiduciaries under their supervision as appertained to a chancellor. *Price v. Peterson*, 38 Ark. 494 (1882) (decision under prior law).



**Errors or Mistakes.**

If a trustee exercised proper care and diligence, he was not responsible for mere error or mistake of judgment. *First Nat'l Bank v. Hawley*, 207 Ark. 587, 182 S.W.2d 194 (1944) (decision under prior law).

**Inability to Make Loans.**

A curator was not liable for the failure to keep money loaned at all times where the security offered was rejected by a probate court if he had used reasonable care in trying to lend the money and in obtaining proper security therefor, and the curator was therefore not liable for any deficiency in interest because he deposited money in a bank at four percent interest which was as high or higher than he would have obtained on government bonds. *Lee v. Beauchamp*, 175 Ark. 716, 300 S.W. 401 (1927) (decision under prior law).

Where a guardian was unable to lend his ward's money on realty, he could deposit the money in a bank, provided interest was agreed to be paid at a rate which was as high or higher than could be obtained on bonds of the United States. *McCown v. Edwards*, 185 Ark. 620, 48 S.W.2d 558 (1932) (decision under prior law).

**Insufficient Security.**

Though a guardian, without an order of a probate court, loaned money of his wards at 10 percent, but upon insufficient security, he would be charged with interest at the legal rate only in the absence of proof that he could have obtained a higher rate upon sufficient security. *Parker v. Wilson*, 98 Ark. 553, 136 S.W. 981 (1911) (decision under prior law).

**Investments Authorized.**

Statutes which enumerate the investments which trustees may make were held to be construed as permissive, intended to provide for situations where the instrument creating the trust did not otherwise provide and did not prohibit other investments which could be authorized by the trust instrument. *State Nat'l Bank v. Murphy*, 207 Ark. 263, 180 S.W.2d 118 (1944) (decision under prior law).

Where a testator had clothed trustee with the power to make such investments and reinvestments as the trustee, from

time to time, deemed safe and desirable and had released the trustee from all liability for any mistake of judgment or losses that might occur in the management of the estate, the trustee was not restricted to particular investments listed by statute. *State Nat'l Bank v. Murphy*, 207 Ark. 263, 180 S.W.2d 118 (1944) (decision under prior law).

Where a testamentary trust directed that income be paid testator's dependents and authorized trustee to sell assets if income was not sufficient to pay specified sum, the trustee was not required to sell the stocks held by testator at his death and invest in so called "legals." *First Nat'l Bank v. Hawley*, 207 Ark. 587, 182 S.W.2d 194 (1944) (decision under prior law).

**Lending Without Court Approval.**

Where a guardian loaned a ward's money without first obtaining a court order authorizing him to make the loan, he assumed the responsibility, and no subsequent order of the probate court confirming his action would relieve him from liability if a loss occurred. *Parker v. Wilson*, 98 Ark. 553, 136 S.W. 981 (1911) (decision under prior law).

Guardians who deposited their wards' funds in a bank over a long period without an order of a probate court became personally liable on the bank's insolvency. *United States Veterans' Bureau v. Riddle*, 186 Ark. 1071, 57 S.W.2d 826 (1933) (decision under prior law).

An allowance to a guardian of credit for loans made without direction of a court and without first mortgage security on real estate was held error. *Allison v. Martindale*, 187 Ark. 1102, 63 S.W.2d 986 (1933) (decision under prior law).

**Savings Bonds.**

In view of regulations of United States Treasury Department, a court properly ordered the guardian of a living, but incompetent, co-owner of matured United States savings bonds, purchased by incompetent with his own money prior to a declaration of incompetency, to convert the bonds into cash and reinvest proceeds in the same manner as original bonds. *Taylor v. Schlotfeldt*, 218 Ark. 589, 237 S.W.2d 890 (1951) (decision under prior law).

**28-65-312. Retention of property and investment.**

(a) If it is in the best interest of the ward or his or her estate, the court may order the guardian of the estate to retain any property belonging to the ward which may come into the hands of the guardian otherwise than by purchase by the guardian, whether or not the property is of the nature authorized by § 28-65-311, as an investment of the ward's funds.

(b) If the guardian of the estate makes an investment which at the time of the making thereof shall meet the requirements of § 28-65-311 and the investment later fails to meet the requirements, the guardian may retain the investment, unless otherwise directed by the court.

**History.** Acts 1985, No. 940, § 36;  
A.S.A. 1947, § 57-855.

**28-65-313. Purchase of home.**

(a) The court may authorize the purchase of real property in this state for use by the ward as a home or, unless he or she is an unmarried minor, as a home for his or her dependent family.

(b) The purchase shall be made only upon order of the court after notice to the ward if he or she is fourteen (14) years of age or over and his or her incompetence is due solely to minority, and to such other persons, if any, as the court may direct.

**History.** Acts 1985, No. 940, § 37;  
A.S.A. 1947, § 57-856.

**CASE NOTES****ANALYSIS**

In General.  
Investment in Real Estate.

**In General.**

A probate court had the power to authorize the guardian of a mentally incompetent veteran to purchase a house for the ward and his dependent family and pay for the house out of the proceeds of the

ward's estate. *United States Fid. & Guar. Co. v. Chambers*, 204 Ark. 81, 160 S.W.2d 888 (1942) (decision under prior law).

**Investment in Real Estate.**

There was no authority giving a probate court the jurisdiction to order a guardian or curator to invest the funds in his hands of the estate of minors in real estate. *Beakley v. Ford*, 123 Ark. 383, 185 S.W. 796 (1916) (decision under prior law).

**28-65-314. Sales, mortgages, etc., of property generally.**

(a)(1) The real or personal property of the ward not excluding real property in which a minor or mentally incompetent ward has a vested homestead interest, or any part thereof or interest therein, may be sold, conveyed, released, mortgaged, leased, or exchanged or an easement thereon may be granted by the guardian of the estate upon such terms as the court may order for the purpose of paying the ward's debts, for providing for his or her care, maintenance, and education and the care, maintenance, and education of his or her dependents, or for investing



the proceeds, or in any other case in which it is for the best interest of the ward.

(2) Participation by a guardian in behalf of his or her ward in the execution and delivery of one (1) or more deeds, bills of sale, assignments, or other appropriate instruments to accomplish the partition in kind between the owners thereof, of real or personal property in which the ward owns an undivided interest, for the purposes of this section shall be deemed an exchange of property of the ward.

(b)(1) A guardian shall not purchase property of the ward unless sold at public sale and approved by the court, and then only if the guardian is a spouse, parent, child, brother, or sister of the ward and is a cotenant with the ward in the property.

(2)(A) This requirement shall not be applicable when a special guardian is appointed to represent the interest of the ward and the special guardian reports to the court after the property has been appraised that the proposed purchase at a private sale is in the best interest of the ward.

(B) The report of the special guardian shall also be subject to the approval of the court after notice to all interested parties is given and a hearing is held by the court.

(c) Prior to or at the time of the approval of the sale of real or personal property made by a guardian, the court shall ascertain whether the guardian's bond is sufficient in amount and security to protect the estate of the ward with respect to the proceeds of the sale. If not, the court shall require that the guardian's bond be increased or supplemented in amount or security to adequately protect the ward's estate.

(d) The provisions of §§ 28-51-105 — 28-51-109, 28-51-201 — 28-51-203, and 28-51-301 — 28-51-309, relative to decedents' estates, shall apply to sales, mortgages, leases, and exchanges of property of the ward of a guardian, except that the extent of the term of a lease of real property of a ward shall not be limited to three (3) years, nor shall the credit to be extended by the guardian be limited to one (1) year.

**History.** Acts 1985, No. 940, § 40; A.S.A. 1947, § 57-859; Acts 1991, No. 1068, § 1.

**Cross References.** Deeds of guardians, § 18-12-605.

Sales by guardians, taxes, and penalties

to be discharged out of proceeds of sale, § 26-35-303.

Sales of land in court proceedings not prohibited unless expressly forbidden by deed, will, or contract, § 18-60-106.

## RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Family Law, 14 U. Ark. Little Rock L.J. 799.

## CASE NOTES

## ANALYSIS

Brokers' Commissions.  
Cash Sales.  
Confirmation of Sales.  
Conveyance of Interest in Real Property.  
Exchange of Homesteads.  
Homesteads Generally.  
Investment of Proceeds.  
Leases Generally.  
Leases of Homesteads.  
Misrepresentation of Title.  
Presumption of Regularity.  
Responsibility for Rent.  
Sale of Homesteads.  
Setting Aside Sales.

**Brokers' Commissions.**

Where a guardian employed a broker to sell a ward's realty, the sale was upon the order and approval of the probate court, and the services were beneficial to the ward's estate, the ward's estate was liable for a commission since the guardian had a right to employ the services of a competent real estate agent to assist in the sale of the ward's property. *Gordon v. Burns*, 203 Ark. 13, 155 S.W.2d 588 (1941) (decision under prior law).

**Cash Sales.**

An order was not rendered void because it directed a sale for cash, since the court had the discretion to so order. *Wells v. Floyd*, 210 Ark. 980, 198 S.W.2d 412 (1946) (decision under prior law).

**Confirmation of Sales.**

A sale by a guardian was not complete until confirmed by a court. *Guynn v. McCauley*, 32 Ark. 97 (1877); *Thomason v. Craighead*, 32 Ark. 391 (1877) (decisions under prior law).

A purchaser who acquired possession of land under an unconfirmed sale of minor's estate became liable for rents and profits. *Ambleton v. Dyer*, 53 Ark. 224, 13 S.W. 926 (1890) (decision under prior law).

A guardian's deed executed in pursuance of an unconfirmed guardian's sale passed no title. *Alexander v. Hardin*, 54 Ark. 480, 16 S.W. 264 (1891); *Lumpkins v. Johnson*, 61 Ark. 80, 32 S.W. 65 (1895) (decisions under prior law).

A guardian's sale confirmed upon application of a purchaser without guardian's

or ward's presence was ineffective. *Morrow v. James*, 69 Ark. 539, 64 S.W. 269 (1901) (decision under prior law).

A court was without authority to confirm any sale of a minor's property which did not bring the required percent of the appraised value, and confirmation of the sale could not supply this failure. *Simmons v. A.C. Carter & Co.*, 125 Ark. 547, 189 S.W. 176 (1916) (decision under prior law).

**Conveyance of Interest in Real Property.**

Trial court erred in finding that a husband's estate was entitled to specific performance of an agreement requiring his wife, an incapacitated person, to pay him in return for sole ownership of their rental properties because although the guardian of the wife's person and estate had the authority to convey her interest in real property, at the time of the husband's death, the deed had not been fully executed and delivered since the husband had not executed it, as a result, upon the husband's death, the rental properties were held by the husband and wife, the wife became the sole owner of the rental property, and the husband's estate had no interest in the property. *Butcher v. Beatty*, 2010 Ark. 130, — S.W.3d — (2010).

**Exchange of Homesteads.**

A probate court could not direct a guardian to exchange his ward's homestead for other lands. *Gatlin v. Lafon*, 95 Ark. 256, 129 S.W. 284 (1910) (decision under prior law).

**Homesteads Generally.**

The provision of § 18-12-403 declaring that no instrument affecting a homestead was valid unless signed by the wife applied also to an insane wife not under guardianship, since this section has never been amended or repealed. *Penney v. Vesells*, 221 Ark. 389, 253 S.W.2d 968 (1952) (decision under prior law).

**Investment of Proceeds.**

An order was not void because of the direction that the proceeds of the sale of land be invested in government bonds, which were understood to be interest-bearing obligations of the United States. *Wells v. Floyd*, 210 Ark. 980, 198 S.W.2d 412 (1946) (decision under prior law).



**Leases Generally.**

A lease, in order to be valid, had to be confirmed. *Gaines v. Gaines*, 116 Ark. 508, 173 S.W. 410 (1915) (decision under prior law).

**Leases of Homesteads.**

A guardian should lease a ward's homestead. *Booth v. Goodwin*, 29 Ark. 633 (1874) (decision under prior law).

**Misrepresentation of Title.**

The rule caveat emptor was held applicable to guardian's sales, but if the guardian misrepresented the title to the purchaser, the latter would not be bound. *Black v. Walton*, 32 Ark. 321 (1877) (decision under prior law).

**Presumption of Regularity.**

An order of a probate court for the sale of a minor's lands will be presumed to have been regularly made where nothing to the contrary appeared in the record, and its validity could not be questioned in a collateral proceeding. *Currie v. Franklin*, 51 Ark. 338, 11 S.W. 477 (1889) (decision under prior law).

**Responsibility for Rent.**

When real estate was in the hands of a ward's ancestor, the guardian was only chargeable with rents actually received. *Haden v. Swepston*, 64 Ark. 477, 43 S.W. 393 (1897); *Rhea v. Bagley*, 66 Ark. 93, 49 S.W. 492 (1899) (decisions under prior law).

**Sale of Homesteads.**

A probate court in which a guardianship of minors was pending could order the sale of a homestead left by ward's parents

for ward's benefit. *Merrill v. Harris*, 65 Ark. 355, 46 S.W. 538 (1898) (decision under prior law).

A guardian could lease his ward's land for a term of years extending beyond the ward's minority. *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909) (decision under prior law).

The probate sale of a minor's homestead by the guardian was absolutely void if the estate was in debt at the time. *Rushing v. Horner*, 130 Ark. 21, 196 S.W. 468 (1917) (decision under prior law).

A probate sale by a guardian of a minor's homestead inherited from his deceased father was void where the order of sale did not show that there were no debts existing against the minor's deceased father. *Puckett v. Glendenning*, 135 Ark. 551, 205 S.W. 454 (1918) (decision under prior law).

A minor's homestead could not be sold where the parent who owned the homestead at the time of his death owed debts. *Smith v. Wofford*, 222 Ark. 315, 259 S.W.2d 507 (1953) (decision under prior law).

**Setting Aside Sales.**

A probate court did not abuse its discretion in refusing to set aside the sale of vacant lots by a guardian at \$50.00 an acre offered by a buyer and appraised by persons suggested by the buyer merely because there had been a recent development in addition. *Hamilton v. Northwest Land Co.*, 223 Ark. 831, 268 S.W.2d 877 (1954) (decision under prior law).

**Cited:** *Reichenbach v. Kizer*, 174 B.R. 997 (Bankr. E.D. Ark 1994).

**28-65-315. Oil, gas, and mineral interests — Sale, lease, etc.**

(a)(1) The guardian of the estate of an incompetent who owns land situated in this state or an interest therein or who owns an interest in oil, gas, or other minerals in or under land situated in this state or in an oil, gas, or other mineral lease on the land on such terms as the guardian deems to be for the best interest of his or her ward and in the name and on behalf of his or her ward may:

(A) Execute, acknowledge, and deliver a lease on the land or interest therein or of the minerals thereunder for the production of oil, gas, or other minerals from those lands;

(B) Make an assignment of the interest in the lease owned by the ward;

(C) Sell and convey the ward's interest in the oil, gas, or other minerals or mineral rights in and under the land or any part thereof; or

(D) Enter into a contract with reference thereto.

(2) Any such lease or assignment, sale, conveyance, or contract shall be binding upon the ward and his or her estate and all parties to the transaction unless set aside as provided in this section.

(b)(1) Within sixty (60) days after the execution, acknowledgment, and delivery of the lease, assignment, conveyance, or contract, the guardian shall report the transaction to the circuit court of the county in which the land or the greater part of the land in area is situated, stating in detail the essential facts with reference to the transaction, attaching to his or her report a copy of the instrument executed by him or her, and praying for an order ratifying the transaction evidenced by the instrument.

(2) After notice given to these persons, if any, as the court may direct, the court shall hear the petition and shall require a showing of the facts required for determination whether the lease, assignment, sale, conveyance, or contract was for the best interest of the ward under the circumstances existing at the time it was made.

(c)(1) If the court finds that the execution of the instrument in question was for the best interest of the ward at the time it was executed and delivered, the court shall make an order approving and confirming the acts of the guardian in executing, acknowledging, and delivering the instrument.

(2) Prior to making the order, the court shall ascertain whether the guardian's bond is sufficient in amount and security to protect the estate of the ward with respect to the proceeds of the transaction involved. If the bond is not sufficient, the court shall require, as a prerequisite to making the order, that the guardian's bond be increased or supplemented in amount or security to adequately protect the ward's estate, including the proceeds of the transaction reviewed. The supplemental bond may be filed with and approved by the court making the order.

(d) If the court finds that the transaction reported by the guardian was not for the best interest of the ward at the time it was entered into, the court shall make an order setting aside the lease, assignment, sale, conveyance, or contract and requiring the guardian to return the consideration he or she may have received for the execution and delivery thereof.

(e) If the court making the order is not the court in which the general guardianship proceedings are pending, the order shall direct that a certified copy of the order and the original of the supplemental bond, if any, with the court's approval endorsed thereon be transmitted promptly by registered mail by the clerk of that court to and filed with the clerk of the court in which the general guardianship proceedings are pending.

(f) A guardian who fails to file a report and petition as required by the provisions of this section within the prescribed time shall be guilty



of a violation and upon conviction shall be fined in any sum not exceeding one thousand dollars (\$1,000).

(g)(1) If the guardian fails to file the report and petition as provided in subsection (b) of this section, the person with whom the guardian has contracted or to whom he or she has executed and delivered an assignment, lease, conveyance, or other instrument, after the expiration of sixty (60) days and within seventy-five (75) days after the date of the lease, assignment, conveyance, contract, or other instrument, may petition the court of the county in which the land or the greater part thereof in area is situated to require the guardian to file the report and petition.

(2) It shall be the duty of the court to order the guardian to appear and show cause why his or her report and petition have not been filed.

(3) After citation of the guardian to appear and after notice given to the other parties, if any, as the court may direct, the court shall determine whether or not the lease, assignment, sale, conveyance, or contract should be approved and confirmed and shall make an order approving and confirming the transaction or setting the transaction aside as provided in subsection (b) of this section, as in the judgment of the court may be required by the facts developed at the hearing.

(h) A lease, assignment, sale, conveyance, or contract made by a guardian under the authority contained in this section that is not reported to the court as provided by subsection (b) or subsection (g) of this section shall be null and void after the expiration of the time provided for the filing of the petition to require the guardian to file his or her report and petition.

**History.** Acts 1985, No. 940, § 41; A.S.A. 1947, § 57-860; Acts 2005, No. 1994, § 182.

#### CASE NOTES

##### **Necessity to Drill.**

It was held to be a matter of common knowledge that it frequently becomes necessary for the owner of land to procure the drilling of wells on his land in order to

prevent drainage of valuable oil therefrom by wells located on adjacent lands. *Layman v. Hodnett*, 205 Ark. 367, 168 S.W.2d 819 (1943) (decision under prior law).

#### **28-65-316. Oil, gas, and mineral interests — Agreements for operation and development.**

Upon petition of the guardian of the estate and after notice to such persons, if any, as the court may direct, the court may authorize the guardian of the estate of an incapacitated person in behalf of his or her ward to enter into transactions and to execute all instruments necessary or advantageous to the ward's estate in the operation and development of any interest, including leasehold interest, which the ward may own in oil, gas, or minerals, including, but not limited to, unit operating agreements, royalty unitization agreements, royalty pooling

agreements, field unitization and repressure agreements, and such other agreements and contracts relative thereto as the court shall find to be for the best interest of the ward.

**History.** Acts 1985, No. 940, § 32; A.S.A. 1947, § 57-851.

### **28-65-317. Payment of claims.**

(a)(1) A guardian of the estate is under a duty to pay from the estate all just claims against the estate of his or her ward, whether they constitute liabilities of the ward which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the ward or his or her estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval by the court in a settlement of the guardian's accounts.

(2) The duty of the guardian to pay from the estate shall not preclude his or her personal liability for his or her own contracts and acts made and performed in behalf of the estate as it exists according to the common law.

(b) Upon the petition of any person having a claim against the estate of a ward for services lawfully rendered to the ward or his or her estate for necessities furnished to the ward, or for the payment of a lawful liquidated claim or demand against the estate of the ward, the court, after notice, upon appropriate hearing, may direct the guardian to pay the claim.

**History.** Acts 1985, No. 940, § 38; A.S.A. 1947, § 57-857.

### **CASE NOTES**

#### **Jurisdiction.**

Claimants had a right to file their claims against the estate of an insane person in the probate court and, having elected to do so, that court had jurisdiction to hear and allow the claims. *First State Bank & Trust Co. v. Thessing*, 241 Ark. 150, 406 S.W.2d 865 (1966) (decision under prior law).

The probate court has exclusive jurisdiction over the payment of claims against a ward's account; therefore, the circuit court was in error in ordering payment. While appellee acted properly in filing and establishing its foreign judgment in circuit court, it then was required to file its claim in the probate court to receive pay-

ment. *Forehand v. American Collection Serv., Inc.*, 307 Ark. 342, 819 S.W.2d 282 (1991).

Sections 28-65-107(a) and this section bring into focus the settled rule that probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or necessarily incidental thereto. *Arkansas State Employees Ins. Advisory Comm. v. Estate of Manning*, 316 Ark. 143, 870 S.W.2d 748 (1994).

The probate court had no subject matter jurisdiction to rule on an insurer's subrogation claim. *Arkansas State Employees Ins. Advisory Comm. v. Estate of Manning*, 316 Ark. 143, 870 S.W.2d 748 (1994).



## 28-65-318. Compromise settlements.

(a) On petition of the guardian of the estate, the court, if satisfied that the action would be in the interest of the ward and his or her estate, may make an order authorizing the settlement or compromise of any claim by or against the ward or his or her estate, whether arising out of contract, tort, or otherwise, and whether arising before or after the appointment of the guardian.

(b)(1) A settlement of a tort claim against a ward made by or in behalf of the guardian of the estate shall be binding, if otherwise valid, without authorization or approval by the court.

(2) However, a guardian shall not take credit in his or her accounts for any money or property expended by him or her in the settlement unless the guardian has first been authorized by the court to make the settlement or unless the guardian, after having made the settlement, establishes to the satisfaction of the court by clear and convincing evidence that the settlement was in the interest of the ward and his or her estate.

(c) A discharge, acquittance, or receipt given by a guardian of the estate for any claim other than one arising out of tort shall be valid in favor of any person who takes it in good faith, but the guardian shall assume the burden of establishing that any compromise not previously approved by the court was made in the interest of the ward and his or her estate and shall be liable to his or her ward if he or she or his or her estate is injured thereby.

**History.** Acts 1985, No. 940, § 39;  
A.S.A. 1947, § 57-858.

## CASE NOTES

### ANALYSIS

Compromise of Claims.  
Jurisdiction of Probate Courts.  
Retention of Attorney.

### Compromise of Claims.

A guardian could compromise claims for personal property if done in good faith. *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S.W. 758 (1910) (decision under prior law).

A probate court was without the power to enforce a compromise of ward's claim against an insurance company. *Union Cent. Life Ins. Co. v. Boggs*, 188 Ark. 604, 66 S.W.2d 1077 (1934) (decision under prior law).

### Jurisdiction of Probate Courts.

Probate courts are courts of limited and specific jurisdiction, and they have only the powers conferred by the Constitution

or by statute or powers necessarily incidental to those specifically granted. *Arkansas Dep't of Human Servs. v. Estate of Hogan*, 314 Ark. 19, 858 S.W.2d 105 (1993).

### Retention of Attorney.

A coguardian of an incompetent ward could retain counsel without court authorization, and such counsel was entitled to reasonable attorney fees set by the probate court for services rendered for the estate of the ward despite the other coguardian's objection that the counsel was representing the coguardian personally where the objecting coguardian had a conflict of interest with the estate of the ward. *Jones v. Barnett*, 236 Ark. 117, 365 S.W.2d 241 (1963) (decision under prior law).

**Cited:** *Arkansas State Employees Ins. Advisory Comm. v. Estate of Manning*, 316 Ark. 143, 870 S.W.2d 748 (1994).

**28-65-319. Employment of professionals.**

(a)(1) The guardian may employ legal counsel in connection with the discharge of his or her duties, and the court shall fix the attorney's fee, which shall be allowed as an item of the expense of administration.

(2) If the guardian is an attorney and has performed necessary legal services in connection with the guardianship, the court shall take into consideration the nature and extent of such services in fixing the compensation of the guardian.

(b) The guardian, when authorized by the court, may employ accountants, engineers, appraisers, brokers, and other persons whose services are reasonably required in the discharge of his or her duties, and the court shall fix the compensation for such services, which shall be allowed as an item of expense of the administration.

**History.** Acts 1985, No. 940, § 42;  
A.S.A. 1947, § 57-861.

**CASE NOTES****ANALYSIS**

**Attorneys.  
Fees.**

**Attorneys.**

A guardian is authorized to employ legal counsel in connection with the discharge of his duties, and the hiring of an attorney is not among those decisions made by a guardian that always requires prior court approval. *Johnson v. Guardianship of Ratcliff*, 72 Ark. App. 85, 34 S.W.3d 749 (2000).

**Fees.**

This section authorizes allowance of fees in favor of a guardian required to defend his actions as guardian and his accounting. The trial court is permitted to take into consideration any failures on the part of the guardian in the allowance of fees. *Winters v. Winters*, 24 Ark. App. 29, 747 S.W.2d 583 (1988).

Trial court abused its discretion in dis-

allowing all fees and costs incurred during specific dates where the trial court gave no explanation for lowering the attorney's hourly fee, nor did the court explain why it cut off fees incurred prior to a certain date; such decisive but unreasoned action clearly constituted an abuse of discretion. *Bailey v. Rahe*, 355 Ark. 560, 142 S.W.3d 634 (2004).

In an estate action, the appellate court was unable to discern whether attorney fees were based on the total market value of the real and personal property reportable to the circuit court or whether they were based on some other measure and certificates of deposit had been inexplicably cashed and placed in a trust and then listed as assets; thus, for purposes of determining attorney fees, which were based in part on the size of the estate, a remand for reconsideration was required to determine which assets were properly estate assets. *Monk v. Griffin*, 92 Ark. App. 320, 213 S.W.3d 651 (2005).

**28-65-320. Accounting.**

(a) Unless otherwise directed by the court, a guardian of the estate shall file with the court a written verified account of his or her administration:

(1) Annually within sixty (60) days after the anniversary date of his or her appointment; and

(2) Within sixty (60) days after termination of his or her guardianship.



(b) Notice of the hearing of every accounting shall be given to the same persons and in the same manner as is required by §§ 28-65-207 and 28-65-208 for notice of the petition for the appointment of a guardian, except that the court may dispense with the giving of notice to a mentally incompetent ward upon a satisfactory showing that the giving of notice would be detrimental to his or her well-being.

(c) With respect to each item for which credit is claimed, the account shall show whether or not the item has been paid, and, in either event, the court may allow or disallow any item in whole or in part, subject to such protection as is extended the guardian with respect to actions taken by him or her in good faith in reliance upon orders previously made by the court.

(d) When notice has been given as provided in subsection (b) of this section, the settlement by the court of an account is binding upon all persons concerned, subject to the right of appeal and to the power of the courts to vacate its final order.

(e) The provisions of §§ 28-52-101, 28-52-103 — 28-52-105, 28-52-107, 28-52-108, and 28-52-110 relating to accounting by a personal representative shall apply also to accounting by a guardian.

(f) A guardian who fails to file an accounting within the time limit prescribed by this section may be denied compensation for services performed between the date an accounting should have been filed and the date it is filed.

**History.** Acts 1985, No. 940, § 43; A.S.A. 1947, § 57-862.

**Cross References.** Attachment to compel accounting, § 28-52-103.

## CASE NOTES

### ANALYSIS

Authority of Courts.  
Compromise of Claims.  
Credit for Ward's Support.  
Exceptions.  
Executor as Guardian.  
Grounds for Attack.  
Release of Surety.  
Reopening of Accounts.  
Review Upon Appeal.  
Separate Accounts.  
Statute of Limitations.

### Authority of Courts.

Though a guardian's power could be revoked by the death or marriage of his ward, a probate court still had the authority to make him account. *Price v. Peterson*, 38 Ark. 494 (1882); *Ruble v. Cottrell*, 57 Ark. 190, 21 S.W. 33 (1893) (decisions under prior law).

Trial court lacked the authority to compel appellant to file an accounting of ap-

pellant's time as guardian of the parties' mother's estate in Pennsylvania because while the statute did not specifically state that a court could only order an accounting from an Arkansas guardian, case law made it plain that an Arkansas court was prohibited from ordering an accounting from a former foreign guardian. *Hetman v. Schwade*, 2009 Ark. 302, 317 S.W.3d 559 (2009).

### Compromise of Claims.

Compromise of a claim enforceable in a circuit or chancery court was not binding when approved only by an order of a probate court prior to the settlement of the guardian's accounts. *Moss v. Moose*, 184 Ark. 798, 44 S.W.2d 825 (1931); *Union Cent. Life Ins. Co. v. Boggs*, 188 Ark. 604, 66 S.W.2d 1077 (1934) (decisions under prior law).

### Credit for Ward's Support.

If a guardian, at the time of furnishing food, clothing, and other items of support,

did not intend to charge the ward, he could not subsequently take credit for such items in his settlement. *Reynolds v. Jones*, 63 Ark. 259, 38 S.W. 151 (1896) (decision under prior law).

Where a ward lived with the guardian as a member of the family and rendered ordinary household services required by parents of their children, such services would be presumed, in absence of clear proof to the contrary, to be sufficient compensation for the ward's support. *Campbell v. Clark*, 63 Ark. 450, 39 S.W. 262 (1897) (decision under prior law).

### **Exceptions.**

Exceptions to accounts were held not triable by jury. *Crow v. Reed*, 38 Ark. 482 (1882) (decision under prior law).

### **Executor as Guardian.**

An executor, as such, could not be required to settle his accounts as executor in a proceeding against him as guardian of an heir to the estate of which he was executor. *Dale v. Dale*, 134 Ark. 61, 203 S.W. 258 (1918) (decision under prior law).

### **Grounds for Attack.**

The settlements of a guardian could be attacked only in chancery for fraud. *Phelps v. Buck*, 40 Ark. 219 (1882); *Haden v. Swepston*, 64 Ark. 477, 43 S.W. 393 (1897) (decisions under prior law).

### **Release of Surety.**

The surety of a guardian's bond was not released from liability thereon until the guardian had filed a final report as required in former similar statute, notice of a hearing thereon had been given, the hearing held, and the report approved by

the court in full compliance with former similar statute. *Nabors v. Quick*, 245 Ark. 560, 433 S.W.2d 844 (1968) (decision under prior law).

### **Reopening of Accounts.**

Where the guardian of an incompetent veteran made proper distribution of the ward's funds after the ward's death, including the payment of bills and obligations incurred in the lifetime of the ward, and the distribution of the estate to the heirs, the guardian's account would not be reopened on motion of an administrator to require the guardian to pay money to the administrator which after payment to the administrator would be distributed in the same manner as it was by guardian, except as to fees which the administrator would receive. *Hicks v. Johnson*, 196 Ark. 103, 116 S.W.2d 597 (1938) (decision under prior law).

### **Review Upon Appeal.**

Upon appeal from an order of a probate court confirming the amount of a guardian of an insane person, the court would review the various items of the account whether exceptions were saved to them in the probate court or not. *Nelson v. Cowling*, 89 Ark. 334, 116 S.W. 890 (1909) (decision under prior law).

### **Separate Accounts.**

A guardian had to file separate accounts for each ward. *Crow v. Reed*, 38 Ark. 482 (1882) (decision under prior law).

### **Statute of Limitations.**

The statute of limitations did not begin to run in favor of a guardian until his discharge. *Connelly v. Weatherford*, 33 Ark. 658 (1878) (decision under prior law).

## **28-65-321. Inventory — Appraisement.**

(a) The guardian of the estate shall file an inventory of the ward's property in the same manner and subject to the same requirements as are provided in § 28-49-110 for the inventory of a decedent's estate.

(b) In its discretion, the court may order the appraisement of the ward's property by one (1) or more disinterested and qualified persons appointed by the court.

**History.** Acts 1985, No. 940, § 24; A.S.A. 1947, § 57-843.

**Cross References.** Assessment of

property, § 26-26-904.

Inventory of estate of decedent, § 28-49-110.



**28-65-322. Reports.**

All guardians shall file an annual report with the court. The report shall contain:

- (1) The person's current mental, physical, and social conditions;
- (2) His or her present living arrangements;
- (3) The need for continued guardianship services;
- (4) An accounting of his or her estate if the guardian has been delegated that responsibility by the court order or as a result of being a guardian of the estate; and
- (5) Any other information requested by the court or necessary in the opinion of the guardian.

**History.** Acts 1985, No. 940, § 25;  
A.S.A. 1947, § 57-844.

**28-65-323. Administration of deceased ward's estate.**

(a) Upon the death of a ward, the guardian of his or her estate is authorized, as such, subject to the direction of the court, to administer the estate of the deceased ward after further letters are issued to him or her, after a hearing, pursuant to a petition for letters, testamentary or of administration, which has been filed not later than forty (40) days after the death of the ward, subject, however, to the provisions of § 28-40-116.

(b) In such a case, the guardian shall file an account of his or her administration of the ward's estate up to the date of the death of the ward and shall cause a notice of the filing of the account to be published combined with a notice to creditors of the deceased ward.

(c) Proceedings for the presentation, allowance, and payment of claims against the estate of the deceased ward shall be governed by the laws relating to claims against decedents' estates, with the guardian serving as personal representative.

(d) Liability on the guardian's bond shall continue and shall apply to the complete administration of the estate of the deceased ward by the guardian.

(e) If letters, testamentary or of administration, are granted to someone other than the guardian upon a petition filed within forty (40) days after the death of the ward, the authority of the guardian to administer the ward's estate shall terminate upon the appointment and qualification of the personal representative, and the guardian shall deliver to the personal representative the assets of the ward's estate remaining in the hands of the guardian.

(f) The probate clerk of the circuit court is entitled to additional fees, not to exceed one hundred dollars (\$100), to cover the initiation of the administration of the ward's estate and, if so initiated, shall direct the personal representative to pay them.

**History.** Acts 1985, No. 940, § 48;  
A.S.A. 1947, § 57-867; Acts 1991, No. 957,  
§ 1; 1997, No. 513, § 1.

# CASE NOTES

## Noncompliance.

Where the guardian of the wife's estate failed to timely obtain letters of administration within forty days of the wife's death, the guardian failed to comply with

§ 28-65-323 and lost her authority to prosecute an action to contest her husband's will on her behalf. *First Sec. Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007).

## SUBCHAPTER 4 — TERMINATION OF GUARDIANSHIP

### SECTION.

28-65-401. Termination generally.

28-65-402. Restoration of capacity of ward.

### SECTION.

28-65-403. Discharge of guardian and surety.

**Cross References.** Termination of guardianship, § 9-26-104.

## RESEARCH REFERENCES

**Am. Jur.** 39 Am. Jur. 2d, Guar. & W., §§ 96, 198, 199, 255.

**C.J.S.** 39 C.J.S., Guar. & W., § 36 et seq.

## 28-65-401. Termination generally.

(a) A guardianship is terminated:

(1) If the guardianship was solely because of the ward's incompetency for a cause other than minority, by an adjudication of the competency of the ward;

(2) By the death of the ward; or

(3) If the guardianship was solely because of the ward's minority, the marriage of the ward shall terminate a guardianship of the person, but not of the estate of the ward except with respect to the ward's earnings for personal services.

(b) A guardianship may be terminated by court order after such notice as the court may require:

(1)(A) If the guardianship was solely because of the ward's minority, and either the ward attains his or her majority or the disability of minority of the ward is removed for all purposes by a court of competent jurisdiction.

(B) However, if the court finds upon a proper showing by substantial competent evidence that it is in the best interest of the ward that the guardianship be continued after the ward reaches majority, the court may order the guardianship to continue until such time as it may be terminated by order of the court;

(2) If the ward becomes a nonresident of this state; or

(3) If, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.



(c)(1) When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration.

(2) When a guardianship terminates by the death of the ward, the guardian of the estate may proceed under § 28-65-323, but the rights of all creditors against the ward's estate shall be determined by the law governing decedents' estates.

**History.** Acts 1985, No. 940, § 45;  
A.S.A. 1947, § 57-864.

### CASE NOTES

#### ANALYSIS

Best Interests of Ward.  
Change of Residence.  
Effect of Guardian's Erroneous Belief.  
Evidence.  
Parents.  
Presumption of Continuation of Incompetency.  
Parties.  
Termination Warranted.

#### Best Interests of Ward.

Where a guardian in succession had been appointed as a result of the improper use of ward's funds by original guardian and natural mother, and ward, then 22, ratified such use of funds, which the guardian in succession was attempting to recover from the mother and her bonding company, it was not in the best interests of the ward to continue the guardianship and it was ordered terminated subject to the payment by the mother and the bonding company of any other claim against them and the costs of the guardianship. *Continental Ins. Co. v. Estate of Rowan*, 252 Ark. 980, 482 S.W.2d 102 (1972) (decision under prior law).

Prior holding that this section allows the court to consider the best interest of the ward in deciding whether to terminate a guardianship and that the rights of the natural parents are not proprietary, would not be interpreted as providing the only guidelines a probate court can consider in terminating a guardianship. *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996).

Trial court erred in applying a child custody change in circumstances analysis

in deciding a mother's petition to terminate the guardianship of her child by his paternal grandmother because the appropriate standard to be applied in guardianship termination proceedings was the statutory standard set out in subdivision (b)(3) of this section. *Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273 (2009).

#### Change of Residence.

The fact that an Arkansas guardianship may be terminated if the ward becomes a nonresident of the state constitutes express legislative recognition that guardians may effect a change in residence. *King v. Beavers*, 148 F.3d 1031 (8th Cir. 1998), cert. denied, 525 U.S. 1002, 119 S. Ct. 513 (1998).

#### Effect of Guardian's Erroneous Belief.

Where a mother erroneously concluded that a minor's marriage emancipated him and that his signed receipt cleared her of liability as his guardian with respect to the father's estate, although the minor was not bound by the signed receipt, and the guardian, before expending the corpus, failed to obtain prior authorization and to file regular reports of expenditures, as required by law, the probate court could properly apply such charges against the minor's claim against his mother-guardian's estate. *Shinley v. Ricks*, 234 Ark. 767, 354 S.W.2d 547 (1962) (decision under prior law).

#### Evidence.

Evidence justified a finding that the natural parents voluntarily consented to an order appointing an aunt as the guardian for their daughter and that they asked

her to raise the child, and while they did not thereby forfeit their parental rights, the burden was upon them to show that a termination of the guardianship would be in the child's best interest. In *re* Guardianship of Markham, 32 Ark. App. 46, 795 S.W.2d 931 (1990).

Mother presented sufficient evidence to show that guardianship was no longer necessary and that it would be in child's best interests to terminate the guardianship and reunite him with his mother; she had entered drug treatment program and remained drug-free since leaving that program, she was happily married, and she voluntarily had been sending guardian support money. *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996).

#### **Parents.**

The rights of parents are not proprietary and are subject to their related duty to care for and protect the child, and the law secures their preferential rights only so long as they discharge their obligations. In *re* Guardianship of Markham, 32 Ark. App. 46, 795 S.W.2d 931 (1990).

#### **Presumption of Continuation of Incompetency.**

Where a person was adjudicated incompetent because of alcoholism, the status of such a person was presumed to continue until a change was established by proof upon a petition addressed to court. *Lester v. Pilkinton*, 225 Ark. 349, 282 S.W.2d 590 (1955) (decision under prior law).

#### **Parties.**

In a guardianship termination proceeding, probate court did not err in dismiss-

ing alleged natural father as a party where there had never been any adjudication of paternity and where alleged natural father, contending that under Texas law a man was considered the father if his name appeared on the child's birth certificate, never filed a birth certificate stating that he was the father with the Texas court. *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996).

#### **Termination Warranted.**

Where an incompetent brought a guardianship termination proceeding, in which she requested the trial court to adjudicate and restore her competency, and the evidence clearly established that the plaintiff was competent to care for herself and her home and had done so for the previous 12 years, the trial court erred in refusing to grant her request because there was no evidence that she suffered from the requisite mental incapacity of unsoundness of mind required to necessitate the appointment of a guardian, notwithstanding the fact that she was unable to properly manage her finances due to her inexperience in such matters. In *re* Estate of Lemley, 9 Ark. App. 140, 653 S.W.2d 141 (1983) (decision under prior law).

Beneficiary who had reached her majority and was not mentally deficient, emotionally unstable, or suffering from any mental illness can have the guardianship of her estate terminated; the purpose of the guardianship was to protect beneficiary's interests as a minor. In *re* Estate of Strickland, 50 Ark. App. 7, 902 S.W.2d 238 (1995).

**Cited:** *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004).

### **28-65-402. Restoration of capacity of ward.**

(a) If any person alleges in writing, verified by oath, that any person declared to be incapacitated, or addicted to habitual drunkenness, is no longer incapacitated, or is no longer so addicted, the court in which the proceedings were held shall cause the facts to be inquired into in such manner as it may direct.

(b) If it is found that the person has been restored to capacity or has reformed, he or she shall be discharged from care and custody, and the guardian shall immediately settle his or her accounts and shall restore to the person all things remaining in the guardian's hands belonging or appertaining to him or her.



**History.** Acts 1985, No. 940, §§ 46, 47;  
A.S.A. 1947, §§ 57-865, 57-866.

### CASE NOTES

#### **Standing.**

Ward has standing to attack a guardianship of his person and estate. *Potter ex rel. Redden v. First Nat'l Bank*, 292 Ark. 74, 728 S.W.2d 167 (1987).

Attorney has authority to act on ward's behalf. *Potter ex rel. Redden v. First Nat'l Bank*, 292 Ark. 74, 728 S.W.2d 167 (1987).

### **28-65-403. Discharge of guardian and surety.**

(a) Upon the guardian of an estate's filing receipts or other evidence satisfactory to the court showing that he or she has delivered to the persons entitled thereto all the property for which he or she is accountable as guardian, the court shall make an order discharging the guardian and his or her surety from further liability or accountability with respect to the guardianship.

(b) The discharge so obtained shall operate as a release from the duties of his or her office which have not previously terminated and shall be final, except that, upon a petition's being filed within three (3) years of the entry thereof, it may be set aside for fraud in the settlement of the account.

**History.** Acts 1985, No. 940, § 49;  
A.S.A. 1947, § 57-868.

### CASE NOTES

#### ANALYSIS

Confirmation of Settlements.  
Jurisdiction over Settlements.  
Release of Surety.  
Setting Aside of Settlements.

#### **Confirmation of Settlements.**

The order of confirmation of a guardian's settlement by the probate court was a judgment which could be appealed from, but which could not be otherwise disturbed, except in a court of chancery upon an allegation of fraud or otherwise recognized ground for equitable relief. *Hardy v. Hardy*, 217 Ark. 296, 230 S.W.2d 6 (1950) (decision under prior law).

#### **Jurisdiction over Settlements.**

When a person for whom a guardian had been appointed as being insane was subsequently adjudged to be sane, a suit for an accounting against the guardian was not within the exclusive jurisdiction of the probate court but could have been maintained in the chancery court. *Smith*

*v. Walker*, 187 Ark. 161, 58 S.W.2d 946 (1933) (decision under prior law).

#### **Release of Surety.**

The surety on a guardian's bond could not be released from liability thereon except upon full compliance with former similar statute. *Nabors v. Quick*, 245 Ark. 560, 433 S.W.2d 844 (1968) (decision under prior law).

Ward's claim against a debtor, his former guardian, did not arise until after the ward had obtained an order in state court removing the debtor as guardian and the ward's claim thus arose post-petition and could not be incorporated into the debtor's proposed modified plan. *In re Heavner*, — B.R. —, 2008 Bankr. LEXIS 3575 (Bankr. E.D. Ark. Aug. 28, 2008).

#### **Setting Aside of Settlements.**

The provision of former similar statute permitting a probate court to set aside a guardian's settlement for fraud, only if the petition was filed within three years after the guardian's discharge, was drafted to

extend the power of the probate court and was not meant to curtail the long recognized power of the chancery court over

such settlements. *Montgomery v. First Nat'l Bank*, 242 Ark. 329, 414 S.W.2d 109 (1967) (decision under prior law).

## SUBCHAPTER 5 — DISPENSING WITH GUARDIANSHIP

### SECTION.

28-65-501. Dispensing with guardianship generally.

28-65-502. Dispensing with guardianship in small estate.

### SECTION.

28-65-503. Ward receiving public assistance.

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**Effective Dates.** Acts 1953, No. 340, § 2: Mar. 28, 1953. Emergency clause provided: "Whereas there are many incompetent persons in the State that have no real or personal property and are dependent for their very existence upon the generosity of charitable persons and institutions, or small incomes from pension boards, or small welfare assistance grants; and whereas these persons are often denied

assistance until a guardian is appointed; and whereas it is often difficult for a guardian to be appointed for such small sums; and whereas it is essential to the public health, safety and interest that these conditions be remedied, an emergency is hereby declared to exist, and this act shall be in effect from and after its approval."

## RESEARCH REFERENCES

**Am. Jur.** 39 *Am. Jur.* 2d, *Guar. & W.*, §§ 5 et seq., 80 et seq.

**C.J.S.** 39 *C.J.S.*, *Guar. & W.*, § 4.

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### 28-65-501. Dispensing with guardianship generally.

(a) The parents of a minor, jointly with equal authority if they are husband and wife living together, or the survivor if one (1) parent is dead, or the competent parent if one (1) is incompetent, or the other parent if one (1) parent is imprisoned for a felony, or the parent to whom the custody of the child has been awarded by a court of competent jurisdiction if the parents are divorced or living apart, or the natural mother of an illegitimate child, shall be the natural guardian of the person of each unmarried minor child of the parents and shall have the care and management of the estate of each such minor derived by gift from the parents or either of them, without the necessity of judicial appointment.

(b) However, upon a showing of a necessity therefor to protect the interests of the minor, the court may appoint a statutory guardian of the estate of the minor, and when appointed and qualified, the statutory guardian shall have exclusive control over the estate of the minor.

(c) The court may appoint the natural guardian as guardian of the estate of the minor.



**History.** Acts 1985, No. 940; § 50;  
A.S.A. 1947, § 57-869.

### CASE NOTES

#### ANALYSIS

Duties of Guardian.  
Effect of Divorce.

#### **Duties of Guardian.**

Where minor daughter had an insurable interest in an automobile, guardian's legal obligation to exercise prudence and due care in managing the estate of the minor gave the guardian an insurable interest in the automobile on behalf of the minor. *Beatty v. USAA Cas. Ins. Co.*, 330 Ark. 354, 954 S.W.2d 250 (1997).

#### **Effect of Divorce.**

Where a wife, upon divorce, obtained sole custody of an infant son of the parties,

she became the sole natural guardian of the son and there was no fiduciary relationship between the husband and the son which would require him to account to the son for the proceeds of a fire insurance policy on a residence held by him in life tenancy with remainder to the son, the insurance having been purchased by the father in his own name and paid for by him. *Barner v. Barner*, 241 Ark. 370, 407 S.W.2d 747 (1966) (decision under prior law).

### **28-65-502. Dispensing with guardianship in small estate.**

When the whole estate of a minor or an incompetent does not exceed the value of five thousand dollars (\$5,000), the court, in its discretion, without the appointment of a guardian or the giving of bond, may authorize the payment or delivery of all or any part of the estate to the minor or incompetent or to some suitable person, institution, or agency for him or her, to be retained, used, expended, distributed, or disposed of for the benefit of the minor or incompetent as the court may direct.

**History.** Acts 1985, No. 940, § 50;  
A.S.A. 1947, § 57-869; Acts 1993, No. 105,  
§ 1.

### **28-65-503. Ward receiving public assistance.**

(a) The circuit court in its discretion, without the appointment of a guardian or the giving of bond, may authorize the payment and delivery of any moneys or other property due or that may in the future become due the minor or incompetent person to some suitable person, institution, or agency for the minor or incompetent person, to be retained, used, expended, distributed, or disposed of, for the benefit of the minor or incompetent person as the court may direct, in cases in which:

- (1) The present total value of the personal property of a minor or an incompetent person is less than one hundred dollars (\$100);
- (2) The minor or incompetent person owns no real property;
- (3) The minor or incompetent person should have a guardian to care for his or her needs; and
- (4) The minor or incompetent person is supported in whole or in part by a monthly income from the Department of Human Services, pension

boards, or any other person or agency except the United States Department of Veterans Affairs.

(b) In the event the moneys or other property of the minor or incompetent person accumulates to a total value of five hundred dollars (\$500) or more, the suitable person shall immediately report that fact to the circuit court.

**History.** Acts 1953, No. 340, § 1; A.S.A. 1947, § 57-646.1; Acts 2005, No. 1962, § 117.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Dicker, Symposium on Developmental Disabilities and the Law — Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled, 4 U. Ark. Little Rock L.J. 485.

## SUBCHAPTER 6 — FOREIGN GUARDIANS

### SECTION.

28-65-601. Petition to act in Arkansas.

28-65-602. Grant or denial of petition to act in Arkansas — Effect.

### SECTION.

28-65-603. Corporate guardians.

28-65-604. Applicability.

**Effective Dates.** Acts 2011, No. 159, § 1: Jan. 1, 2012.

### 28-65-601. Petition to act in Arkansas.

(a) If an incompetent person who is a resident of another state, a territory of the United States, or the District of Columbia has a guardian, curator, conservator, committee, tutor, or other person authorized by the laws of the other jurisdiction to have possession and control of the property of the incompetent person, such a person being hereinafter referred to as “foreign guardian”, the foreign guardian may petition the circuit court of the county of this state in which a guardianship of the estate of the incompetent person is pending, or, if no such guardianship is pending in this state, of any county in which there is property belonging to his or her ward, or in which a cause of action in behalf of his or her ward may be lawfully brought, for authority:

(1) To remove the property to the domicile of the guardian and his or her ward;

(2) To sell, mortgage, lease, or exchange the property of his or her ward or to take any other action with reference thereto which a locally appointed guardian would be authorized to take and to remove the proceeds to the domicile of the guardian and his or her ward; or

(3) To bring the action in behalf of his or her ward.



(b) The foreign guardian shall file with his or her petition an authenticated copy of his or her letters of guardianship, or other appropriate evidence of his or her appointment and qualification, an authenticated copy of the bond, if any, filed by him or her with the court which appointed him or her, and evidence of the value of the property of the ward in the jurisdiction of his or her appointment.

**History.** Acts 1985, No. 940, § 51;  
A.S.A. 1947, § 57-870.

### **28-65-602. Grant or denial of petition to act in Arkansas — Effect.**

(a) Upon being satisfied that the foreign guardian is duly appointed, qualified, and acting, that his or her bond is sufficient under the laws of the jurisdiction of his or her appointment to protect the property of the ward within the jurisdiction and the property within this state, or its proceeds, or that no bond is required in the jurisdiction of his or her appointment, and that the action ordered to be taken is in the best interest of the ward and his or her estate, the court may, if there is no locally appointed guardian, grant the petition, in whole or in part, and direct the foreign guardian to proceed with the directed action in the same manner as is provided for similar action by a resident guardian of the estate or a resident ward.

(b) If there is a locally appointed guardian, and upon the same findings as to the qualifications of the foreign guardian and the sufficiency of his or her bond, if any, the court, in the exercise of its discretion, may:

(1) Order the termination of the local guardianship and the payment, transfer, or delivery of the property of the ward to the foreign guardian and grant the petition of the foreign guardian, in whole or in part; or

(2) Order the local guardian to take the action, in whole or in part, for which the foreign guardian asked authority; or

(3) Deny the petition.

(c) If the court orders the termination of the local guardianship, the local guardian shall file his or her account immediately.

**History.** Acts 1985, No. 940, § 51;  
A.S.A. 1947, § 57-870.

### **28-65-603. Corporate guardians.**

If the foreign guardian is a corporation, it need not qualify as a corporation to do business under the general corporation laws of this state to entitle it to administer the property of its ward situated in this state.

**History.** Acts 1985, No. 940, § 51;  
A.S.A. 1947, § 57-870.

**28-65-604. Applicability.**

This subchapter does not apply to foreign guardianships under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

**History.** Acts 2011, No. 159, § 4.

**SUBCHAPTER 7 — PUBLIC GUARDIAN FOR ADULTS****SECTION.**

28-65-701. Office of Public Guardian for Adults — Creation.

28-65-702. Public Guardian for Adults — Appointment — Qualifications.

28-65-703. Public Guardian for Adults — Duties.

**SECTION.**

28-65-704. Correspondence and legal process.

28-65-705. No bond required.

28-65-706. Termination of guardianships.

28-65-707. Department of Human Services — Adoption of rules.

**A.C.R.C. Notes.** Acts 2007, No. 862, § 1, provided: “Legislative findings.

“The General Assembly finds that:

“(1) Many adults lack the capacity to provide informed consent to necessary health care, have not executed an advance health care directive or a durable power of attorney, and have no friend or family member qualified and willing to consent on their behalf; and

“(2) It is therefore necessary for the preservation of the public health and safety to provide for a public guardian who can make informed consent to needed medical and long-term care on behalf of incapacitated adults who are unable to consent for themselves and for whom

there is no other person qualified and willing to consent.”

**Effective Dates.** Acts 2007, No. 862, § 5, provided: “Contingent Effectiveness. This act shall take effect upon the occurrence of the following: (1) The Director of the Division of Aging and Adult Services of the Department of Health and Human Services determines that adequate appropriation, funding, and positions are available to carry out a public guardianship program for adults; and (2) The director appoints an employee of the Division of Aging and Adult Services to serve as Public Guardian for Adults.” This contingency is deemed to have been met by Acts 2009, No. 433.

**28-65-701. Office of Public Guardian for Adults — Creation.**

(a) The Office of Public Guardian for Adults is created.

(b) The Public Guardian for Adults shall be the administrator of the office.

**History.** Acts 2007, No. 862, § 4.

**28-65-702. Public Guardian for Adults — Appointment — Qualifications.**

(a) The Director of the Division of Aging and Adult Services of the Department of Human Services shall appoint an employee of the



Division of Aging and Adult Services to serve as the Public Guardian for Adults.

(b)(1) In addition to the qualifications required under § 28-65-203, the public guardian shall:

(A) Hold a degree in law or social work or a related field;

(B) Submit to a criminal background check with satisfactory results as prescribed by the division;

(C) Attend and complete at least twenty (20) hours of training approved by the division; and

(D) Demonstrate competency and ability to carry out the values of the ward.

(2) The Public Guardian for Adults shall devote his or her entire time to the duties of the Office of Public Guardian for Adults.

(c) The Public Guardian for Adults:

(1) May consent or withhold consent to health and long-term care treatment;

(2) Shall advocate for the ward; and

(3) Shall be functionally separate from and share no duties with any Department of Human Services employee whose job it is to prepare and offer services or treatment plans, or both, to any person.

**History.** Acts 2007, No. 862, § 4.

### **28-65-703. Public Guardian for Adults — Duties.**

(a) The Public Guardian for Adults:

(1) Shall administer and organize the work of the Office of Public Guardian for Adults;

(2) May employ staff as necessary to carry out the functions of the office; and

(3)(A) May accept the services of volunteers who shall possess all of the qualifications of a guardian required under § 28-65-203.

(B) If approved by the Public Guardian for Adults, the volunteer shall be reimbursed for expenses in the same manner as public employees.

(C) A volunteer shall not be an employee of any facility or program that provides services to the ward.

(D) Volunteers shall not be related to the owner or any staff member of any facility or program that provides services to the ward.

(b) The Public Guardian for Adults shall receive and review referrals for adult guardianship.

(c) The Public Guardian for Adults may petition to be appointed guardian of the person of an adult or guardian of the property of an adult, or both, if:

(1) The Public Guardian for Adults has probable cause to believe that the adult lacks the capacity to make and communicate decisions necessary for his or her health, safety, and welfare or to manage his or her property;

(2) The Public Guardian for Adults believes that the adult is incapacitated;

(3) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(4) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

(d) If requested by the court having jurisdiction of the ward, the Public Guardian for Adults may petition to intervene in an established guardianship and petition to be named a successor guardian if all of the following conditions are met:

(1) The Public Guardian for Adults determines that the current guardian is unable or unwilling to perform his or her duties under the guardianship;

(2) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(3) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

(e)(1) The Public Guardian for Adults either directly or through staff or volunteered services shall monitor each ward and each ward's care and progress on a continuing basis.

(2) The monitoring shall include quarterly personal contact with each ward.

(3) A written record shall be created and maintained concerning each personal contact and shall contain the information specified in § 28-65-322.

(f)(1) The Public Guardian for Adults shall keep and maintain financial, case control, and statistical records in accordance with generally accepted professional business and accounting standards in all cases for which the Office of Public Guardian for Adults has been appointed guardian.

(2) Office records that identify individuals for whom the office has provided guardianship services shall be kept confidential except to the extent that disclosure is required by other laws.

(3) Office records shall be retained in accordance with state record retention rules.

(g) Unless specifically provided otherwise in this subchapter, this chapter is applicable to any guardianship established under this subchapter.

**History.** Acts 2007, No. 862, § 4.

## **28-65-704. Correspondence and legal process.**

All correspondence and legal process regarding a public guardianship under this subchapter shall be to or from the Public Guardian for Adults in his or her official capacity.

**History.** Acts 2007, No. 862, § 4.



**28-65-705. No bond required.**

Bond shall not be required in connection with public guardian services under this subchapter.

**History.** Acts 2007, No. 862, § 4.

**28-65-706. Termination of guardianships.**

(a) The court having jurisdiction of the ward shall not terminate the guardianship of a living ward of the Public Guardian for Adults unless the court declares that the ward is restored to capacity or a successor guardian is appointed.

(b) Neither the Public Guardian for Adults, the Office of Public Guardian for Adults, nor a volunteer shall be entitled to compensation under § 28-65-108.

**History.** Acts 2007, No. 862, § 4.

**28-65-707. Department of Human Services — Adoption of rules.**

The Department of Human Services may adopt rules necessary to implement this subchapter.

**History.** Acts 2007, No. 862, § 4.

## CHAPTER 66

### UNIFORM VETERANS' GUARDIANSHIP ACT

**SECTION.**

- 28-66-101. Definitions.
- 28-66-102. Administrator as party in interest.
- 28-66-103. Application.
- 28-66-104. Limitation on number of wards.
- 28-66-105. Appointment of guardians.
- 28-66-106. Evidence of necessity for guardian for infant.
- 28-66-107. Evidence of necessity for guardian for incompetent.
- 28-66-108. Notice.
- 28-66-109. Bond.
- 28-66-110. Petitions and accounts, notices and hearings.
- 28-66-111. Penalty for failure to account.
- 28-66-112. Compensation of guardians.

**SECTION.**

- 28-66-113. Investments.
- 28-66-114. Maintenance and support.
- 28-66-115. Purchase of home for ward.
- 28-66-116. Copies of public records to be furnished.
- 28-66-117. Discharge of guardian and release of sureties.
- 28-66-118. Commitment to Veterans' Administration or other agency of United States Government.
- 28-66-119. Liberal construction.
- 28-66-120. Short title.
- 28-66-121. Severability.
- 28-66-122. Modification of prior laws.
- 28-66-123. Application of chapter.
- 28-66-124. Time of taking effect.

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**Publisher's Notes.** For Comments regarding the Uniform Veterans' Guardianship Act, see Commentaries Volume B.

**Cross References.** Guardianship of incapacitated persons, § 28-65-101 et seq.  
**Effective Dates.** Acts 1961, No. 36,

§ 3: Feb. 6, 1961. Emergency clause provided: "It is hereby determined that the present laws pertaining to the investment of a ward's funds are inadequate; and thus immediate passage of this Act is necessary to remedy the situation; and therefore an

emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

### CASE NOTES

#### **Capacity to Marry or Sue for Divorce.**

The mere fact that a man had been adjudged incompetent under the Uniform Veterans' Guardian Act and a guardian was appointed for his estate did not affect his capacity to marry or sue for divorce

where he had never needed a personal guardian and the incompetency had been established 11 years before the marriage and almost 20 years prior to the divorce action. *Lovett v. Lovett*, 254 Ark. 349, 493 S.W.2d 435 (1973).

### **28-66-101. Definitions.**

As used in this chapter:

"Person" means an individual, a partnership, a corporation, or an association;

"Veterans' Administration" means the Veterans' Administration, its predecessors or successors;

"Income" means money received from the Veterans' Administration and revenue or profit from any property wholly or partially acquired therewith;

"Estate" means income on hand and assets acquired partially or wholly with income;

"Benefits" means all moneys paid or payable by the United States through the Veterans' Administration;

"Administrator" means the Administrator of Veterans Affairs of the United States or his successor;

"Ward" means a beneficiary of the Veterans' Administration;

"Guardian" means any fiduciary for the person or estate of a ward.

**History.** Acts 1943, No. 177, § 1; A.S.A. 1947, § 57-501.

### RESEARCH REFERENCES

**ALR.** Validity, construction, and application of Uniform Veterans' Guardianship Act. Validity, Construction, and Application of Uniform Veterans' Guardianship Act<shortt>Veterans' Guardianship Act"

generated="0" attreq="0"/>113 A.L.R.5th 283.

**Ark. L. Rev.** Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

### **28-66-102. Administrator as party in interest.**

The administrator shall be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward, and in any suit or



other proceeding affecting in any manner the administration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans' Administration. Not less than fifteen (15) days prior to hearing in such matter notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the Veterans' Administration having jurisdiction over the area in which any such suit or any such proceeding is pending.

**History.** Acts 1943, No. 177, § 2; A.S.A. 1947, § 57-502.

### **28-66-103. Application.**

Whenever, pursuant to any law of the United States or regulation of the Veterans' Administration, it is necessary, prior to payment of benefits, that a guardian be appointed, the appointment may be made in the manner hereinafter provided.

**History.** Acts 1943, No. 177, § 3; A.S.A. 1947, § 57-503.

### **28-66-104. Limitation on number of wards.**

No person other than a bank or trust company shall be guardian of more than five (5) wards at one (1) time, unless all the wards are members of one (1) family.

Upon presentation of a petition by an attorney of the Veterans' Administration or other interested person, alleging that a guardian is acting in a fiduciary capacity for more than five (5) wards as herein provided and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge him from guardianships in excess of five (5) and forthwith appoint a successor.

**History.** Acts 1943, No. 177, § 4; A.S.A. 1947, § 57-504.

### **28-66-105. Appointment of guardians.**

(1) A petition for the appointment of a guardian may be filed by any relative or friend of the ward or by any person who is authorized by law to file such a petition. If there is no person so authorized or if the person so authorized refuses or fails to file such a petition within thirty (30) days after the mailing of notice by the Veterans' Administration to the last known address of the person, if any, indicating the necessity for the same, a petition for appointment may be filed by any resident of this state.

(2) The petition for appointment shall set forth the name, age, place of residence of the ward, the name and place of residence of the nearest relative, if known, and the fact that the ward is entitled to receive

benefits payable by or through the Veterans' Administration and shall set forth the amount of moneys then due and the amount of probable future payments.

(3) The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward and the name, age, relationship, if any, occupation, and address of the proposed guardian, and, if the nominee is a natural person, the number of wards for whom the nominee is presently acting as guardian.

Notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian, if the court determines it is for the best interest of the ward.

(4) In the case of a mentally incompetent ward, the petition shall show that such ward has been rated incompetent by the Veterans' Administration on examination in accordance with the laws and regulations governing the Veterans' Administration.

**History.** Acts 1943, No. 177, § 5; A.S.A. 1947, § 57-505.

#### **28-66-106. Evidence of necessity for guardian for infant.**

Where a petition is filed for the appointment of a guardian for a minor, a certificate of the administrator or his authorized representative, setting forth the age of such minor as shown by the records of the Veterans' Administration and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Veterans' Administration, shall be prima facie evidence of the necessity for such appointment.

**History.** Acts 1943, No. 177, § 6; A.S.A. 1947, § 57-506.

#### **28-66-107. Evidence of necessity for guardian for incompetent.**

Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the administrator or his duly authorized representative that such person has been rated incompetent by the Veterans' Administration on examination in accordance with the laws and regulations governing such Veterans' Administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the Veterans' Administration shall be prima facie evidence of the necessity for such appointment.

**History.** Acts 1943, No. 177, § 7; A.S.A. 1947, § 57-507.



**28-66-108. Notice.**

Upon the filing of a petition for the appointment of a guardian under this chapter, notice shall be given to the ward, to such other persons, and in such manner as is provided by the general law of this state, and also to the Veterans' Administration as provided by this chapter.

**History.** Acts 1943, No. 177, § 8;  
A.S.A. 1947, § 57-508.

**28-66-109. Bond.**

(1) Upon the appointment of a guardian, he shall execute and file a bond to be approved by the court in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year. The bond shall be in the form and be conditioned as required of guardians appointed under the general guardianship laws of this state. The court may from time to time require the guardian to file an additional bond.

(2) Where a bond is tendered by a guardian with personal sureties, there shall be at least two (2) such sureties, and they shall file with the court a certificate under oath which shall describe the property owned, both real and personal, and shall state that each is worth the sum named in the bond as the penalty thereof over and above all his debts and liabilities and the aggregate of other bonds on which he is principal or surety and exclusive of property exempt from execution. The court may require additional security or may require a corporate surety bond, the premium thereon to be paid from the ward's estate.

**History.** Acts 1943, No. 177, § 9; A.S.A.  
1947, § 57-509.

**28-66-110. Petitions and accounts, notices and hearings.**

(1) Every guardian who has received or shall receive on account of his ward any moneys or other thing of value from the United States Department of Veterans Affairs shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys or other things of value so received by him, all earnings, interest, or profits derived therefrom and all property acquired therewith and of all disbursements therefrom, including interest paid on any loan or debt, and showing the balance thereof in his hands at the date of the account and how invested.

(2) The guardian, at the time of filing any account, shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or, upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing

that he has examined the securities or investments and identified them with those described in the account, and shall note any omissions or discrepancies. If the depository is the guardian, the certifying officer shall not be the officer verifying the account. The guardian may exhibit the securities or investments to the judge of the court, who shall indorse on the account and copy thereof a certificate that the securities or investments shown therein as held by the guardian were each in fact exhibited to him and that those exhibited to him were the same as those shown in the account, and note any omission or discrepancy. That certificate and the certificate of an official of the bank in which are deposited any funds for which the guardian is accountable, showing the amount on deposit, shall be prepared and signed in duplicate and one (1) of each shall be filed by the guardian with his account.

(3) At the time of filing in the court any account, a certified copy thereof and a signed duplicate of each certificate filed with the court shall be sent by the guardian to the office of the United States Department of Veterans Affairs having jurisdiction over the area in which the court is located. A signed duplicate or a certified copy of any petition, motion, or other pleading, pertaining to an account, or to any matter other than an account and which is filed in the guardianship proceedings or in any proceeding for the purpose of removing the disability of minority or mental incapacity, shall be furnished by the person filing the same to the proper office of the United States Department of Veterans Affairs. Unless the hearing be waived in writing by the attorney of the United States Department of Veterans Affairs, and by all other persons, if any, entitled to notice, the court shall fix a time and place for the hearing on the account, petition, motion, or other pleading not less than fifteen (15) days nor more than thirty (30) days from the date same is filed, unless a different available date be stipulated in writing. Unless waived in writing, written notice of the time and place of hearing shall be given the United States Department of Veterans Affairs office concerned and the guardian and any others entitled to notice not less than fifteen (15) days prior to the date fixed for the hearing. The notice may be given by mail in which event it shall be deposited in the mails not less than fifteen (15) days prior to said date. The court, or clerk thereof, shall mail to said United States Department of Veterans Affairs office a copy of each order entered in any guardianship proceeding wherein the administrator is an interested party.

(4) If the guardian is accountable for property derived from sources other than the United States Department of Veterans Affairs, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the United States Department of Veterans Affairs, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.



**History.** Acts 1943, No. 177, § 10; A.S.A. 1947, § 57-510; Acts 2005, No. 658, § 1.

**A.C.R.C. Notes.** The language added

by the amendment of this section by Acts 2005, No. 658, is not part of an official NCCUSL revision of the 1942 Uniform Veterans' Guardianship Act.

### CASE NOTES

#### ANALYSIS

Nature of Proceedings.  
Reopening Account.

#### **Nature of Proceedings.**

When the guardian of an incompetent veteran presented a settlement to the probate court, the proceeding was not adversary in the sense that the ward had to be represented by one especially appointed for that purpose; rather, it was the court's duty to examine the account and to take such steps as were necessary to verify the guardian's fidelity. *Lingo v. Rainwater*,

199 Ark. 618, 136 S.W.2d 161 (1940) (decision under prior law).

#### **Reopening Account.**

A guardian's account made after the death of a ward would not be reopened on motion of an administrator because of payments made after the death of the ward where such payments were approved by a representative of the Veterans' Bureau and the probate court, and the same payments would be required to be made by the administrator if the administrator received the money. *Hicks v. Johnson*, 196 Ark. 103, 116 S.W.2d 597 (1938) (decision under prior law).

### **28-66-111. Penalty for failure to account.**

If any guardian shall fail to file with the court any account as required by this chapter, or by an order of the court, when any account is due, or within thirty (30) days after citation issues as provided by law, or shall fail to furnish the United States Department of Veterans Affairs a true copy of any account, petition, or pleading as required by this chapter, or fail to disclose the payment of interest on any loan or debt, such failure may in the discretion of the court be ground for his removal.

**History.** Acts 1943, No. 177, § 11; A.S.A. 1947, § 57-511; Acts 2005, No. 658, § 2.

**A.C.R.C. Notes.** The language added

by the amendment of this section by Acts 2005, No. 658, is not part of an official NCCUSL revision of the 1942 Uniform Veterans' Guardianship Act.

### **28-66-112. Compensation of guardians.**

Compensation payable to guardians shall be based upon services rendered and shall not exceed six percent (6%) of the amount of moneys received during the period covered by the account, provided that during any period in which benefits are not being paid for a ward, then compensation to guardians may instead be calculated on a basis not to exceed one percent (1%) of the market value of the estate of the ward per annum. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the Department of Veterans Affairs in the manner provided in the case of hearing on a guardian's account or other pleading. No commission or compensation

shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

**History.** Acts 1943, No. 177, § 12; A.S.A. 1947, § 57-512; Acts 1995, No. 503, § 1.

### **28-66-113. Investments.**

Every guardian shall invest the surplus funds of his ward's estate in such securities or property as authorized under the laws of this state but only upon prior order of the court; except that the funds may be invested without prior court authorization, in direct unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States. A signed duplicate or certified copy of the petition for authority to invest shall be furnished the proper office of the Veterans' Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account. If the guardian of the estate is a state or national bank or trust company authorized by provisions of §§ 28-69-201 — 28-69-204 to establish and maintain common trust funds and if the guardian has established and be maintaining such a common trust fund, the guardian may invest the ward's fund in participations in such common trust funds, without prior order of the court.

**History.** Acts 1943, No. 177, § 13; 1961, No. 36, § 1; A.S.A. 1947, § 57-513.

### **28-66-114. Maintenance and support.**

A guardian shall not apply any portion of the income or the estate for the support or maintenance of any person other than the ward, the spouse, and the minor children of the ward, except upon petition to and prior order of the court after a hearing. A signed duplicate or certified copy of said petition shall be furnished the proper office of the Veterans' Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account or other pleading.

**History.** Acts 1943, No. 177, § 14; A.S.A. 1947, § 57-514.

## **CASE NOTES**

### **Purchase of Home.**

A probate court had the power to authorize the guardian of a mentally incompetent veteran to purchase a home for the ward and his dependent family and pay

for the home out of the proceeds of the ward's estate. *United States Fid. & Guar. Co. v. Chambers*, 204 Ark. 81, 160 S.W.2d 888 (1942) (decision under prior law).



**28-66-115. Purchase of home for ward.**

(1) The court may authorize the purchase of the entire fee simple title to real estate in this state in which the guardian has no interest, but only as a home for the ward, or to protect his interest, or (if he is not a minor) as a home for his dependent family. Such purchase of real estate shall not be made except upon the entry of an order of the court after hearing upon verified petition. A copy of the petition shall be furnished the proper office of the United States Department of Veterans Affairs and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account. As used in this subdivision (1), "no interest" means that a guardian should not even have a mortgage lien interest in the real estate purchased as a home for the ward.

(2) Before authorizing such investment, the court shall require written evidence of value and of title and of the advisability of acquiring such real estate. Title shall be taken in the ward's name. This section does not limit the right of the guardian on behalf of his ward to bid and to become the purchaser of real estate at a sale thereof pursuant to decree of foreclosure of lien held by or for the ward, or at a trustee's sale, to protect the ward's right in the property so foreclosed or sold; nor does it limit the right of the guardian, if such be necessary to protect the ward's interest and upon prior order of the court in which the guardianship is pending, to agree with cotenants of the ward for a partition in kind, or to purchase from cotenants the entire undivided interest held by them, or to bid and purchase the same at a sale under a partition decree, or to compromise adverse claims of title to the ward's realty.

**History.** Acts 1943, No. 177, § 15; A.S.A. 1947, § 57-515; Acts 2005, No. 658, § 3.

by the amendment of this section by Acts 2005, No. 658, is not part of an official NCCUSL revision of the 1942 Uniform Veterans' Guardianship Act.

**A.C.R.C. Notes.** The language added

**28-66-116. Copies of public records to be furnished.**

When a copy of any public record is required by the Veterans' Administration to be used in determining the eligibility of any person to participate in benefits made available by the Veterans' Administration, the official custodian of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the Veterans' Administration with a certified copy of such record.

**History.** Acts 1943, No. 177, § 16; A.S.A. 1947, § 57-516.

**28-66-117. Discharge of guardian and release of sureties.**

In addition to any other provisions of law relating to judicial restoration and discharge of guardian, a certificate by the Veterans' Administration showing that a minor ward has attained majority, or that an incompetent ward has been rated competent by the Veterans' Administration upon examination in accordance with law shall be prima facie evidence that the ward has attained majority, or has recovered his competency. Upon hearing after notice as provided by this chapter and the determination by the court that the ward has attained majority or has recovered his competency, an order shall be entered to that effect, and the guardian shall file a final account. Upon hearing after notice to the former ward and to the Veterans' Administration, as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him from the guardian, the guardian shall be discharged and his sureties released.

**History.** Acts 1943, No. 177, § 17;  
A.S.A. 1947, § 57-517.

**28-66-118. Commitment to Veterans' Administration or other agency of United States Government.**

(1) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans' Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans' Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans' Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this chapter shall affect his right to appear and be heard in the proceedings. Upon commitment, such person when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans' Administration or other agency. The chief officer of any facility of the Veterans' Administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole, or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed and to determine the necessity for



continuance of his restraint, and all commitments pursuant to this chapter are so conditioned.

(2) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans' Administration, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint, as is provided in subsection (1) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the Veterans' Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole, or discharge the committed person.

(3) Upon receipt of a certificate of the Veterans' Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans' Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans' Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans' Administration or other agency of the United States pursuant to the original commitment.

**History.** Acts 1943, No. 177, § 18; 404, which are nearly identical to this A.S.A. 1947, § 57-518. section.

**Publisher's Notes.** This section may be superseded by §§ 20-47-402 — 20-47-404. **Cross References.** Commitment, § 20-47-401 et seq.

### CASE NOTES

#### In General.

Under the revised Uniform Veterans' Guardianship Act, the involuntary commitment of an incompetent veteran may

be to Veterans Administration directly, or an eligible veteran committed originally to a state institution may be transferred to a Veterans Administration facility. Gid-

ney v. Sterling, 202 F. Supp. 344 (E.D. Ark. 1962).

### **28-66-119. Liberal construction.**

This chapter shall be so construed to make uniform the law of these states which enact it.

**History.** Acts 1943, No. 177, § 19;  
A.S.A. 1947, § 57-519.

### **28-66-120. Short title.**

This chapter may be cited as the "Uniform Veterans' Guardianship Act."

**History.** Acts 1943, No. 177, § 20;  
A.S.A. 1947, § 57-520.

### **28-66-121. Severability.**

If any provision of this chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

**History.** Acts 1943, No. 177, § 21;  
A.S.A. 1947, § 57-520n.

### **28-66-122. Modification of prior laws.**

All acts or parts of acts relating to beneficiaries of the Veterans' Administration inconsistent with this chapter are hereby repealed, especially §§ 6318 to 6337 inclusive of Pope's Digest of the Statutes of Arkansas, and Act 283 of 1941. Except where inconsistent with this chapter, the laws of this state relating to guardian and ward and the judicial practice relating thereto, including the right to trial by jury and the right of appeal, shall be applicable to such beneficiaries and their estates.

**History.** Acts 1943, No. 177, § 22;  
A.S.A. 1947, § 57-521.

### **28-66-123. Application of chapter.**

The provisions of this chapter relating to surety bonds and the administration of estates of wards shall apply to all "income" and "estate" as defined in § 28-66-101 whether the guardian shall have been appointed under this chapter or under any other law of this state, special or general, prior or subsequent to the enactment hereof.



**History.** Acts 1943, No. 177, § 23;  
A.S.A. 1947, § 57-522.

**28-66-124. Time of taking effect.**

This chapter shall take effect from and after June 10, 1943.

**History.** Acts 1943, No. 177, § 24;  
A.S.A. 1947, § 57-522n.

**Publisher's Notes.** As enacted, this section provided that it would take effect "after its passage and approval." It was approved on March 6, 1943. However, such effective date is invalid under Arkan-

sas Tax Comm'r v. Moore, 103 Ark. 48, 145 S.W. 199 (1912), and Cunningham v. Walker, 198 Ark. 928, 132 S.W.2d 24 (1939). Consequently, the general effective date for the 1943 regular session has been inserted in this section.

**CHAPTER 67**

**CONSERVATORS FOR THE AGED AND DISABLED**

SECTION.

- 28-67-101. Chapter cumulative.
- 28-67-102. Jurisdiction of the court.
- 28-67-103. Petition for appointment.
- 28-67-104. Notice of hearing.
- 28-67-105. Appointment.
- 28-67-106. Persons ineligible as conservator.

SECTION.

- 28-67-107. Management of estate — Bond.
- 28-67-108. Powers and duties.
- 28-67-109. Discharge.
- 28-67-110. Compensation.
- 28-67-111. Subsequent appointment of guardian — Effect.

**Effective Dates.** Acts 2011, No. 159, § 1: Jan. 1, 2012.

**Cross References.** Guardianship of incapacitated persons, § 28-65-101 et seq.

**RESEARCH REFERENCES**

- ALR.** Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative. 11 A.L.R.4th 638.
- Am. Jur.** 39 Am. Jur. 2d, Guar. & W., § 31.
- Ark. L. Rev.** Brantley, Use of the Trust to Manage Property of the Elderly or Disabled, 42 Ark. L. Rev. 619.

- C.J.S.** 39 C.J.S., Guar. & W., §§ 8, 9.
- U. Ark. Little Rock L.J.** Dicker, Symposium on Developmental Disabilities and the Law — Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled, 4 U. Ark. Little Rock L.J. 485.

**28-67-101. Chapter cumulative.**

The provisions of this chapter shall be cumulative to the Probate Code. Nothing in this chapter shall amend or repeal related statutes pertaining to the appointment of guardians of the estate of incompetents.

**History.** Acts 1975, No. 372, § 10; referred to in this section, is codified as set out in the note following § 28-1-101.

**Publisher's Notes.** The Probate Code,

### CASE NOTES

**Cited:** Francis v. Francis, 343 Ark. 104, 31 S.W.3d 841 (2000).

#### 28-67-102. Jurisdiction of the court.

(a) All laws relative to the jurisdiction of the circuit court over the estate of a person under guardianship as an incompetent person, including the investment, management, sale, or mortgage of his or her property and the payment of his or her debts, shall be applicable to the estate of a person under conservatorship.

(b) Court jurisdiction for adult guardianship actions, excluding proceedings under the Adult Custody Maltreatment Act, § 9-20-101 et seq., and conservatorship actions that involve a party residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

(c) The appropriate jurisdiction for an adult guardianship action under the Adult Custody Maltreatment Act, § 9-20-101 et seq., that involves a maltreated adult residing outside the state shall be determined under the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, § 28-74-101 et seq.

**History.** Acts 1975, No. 372, § 6; A.S.A. 1947, § 57-706; Acts 2011, No. 159, § 5.

**Amendments.** The 2011 amendment added (b) and (c).

#### 28-67-103. Petition for appointment.

A hearing may be had upon a petition for appointment of a conservator when:

(1) It is represented to the circuit court, upon verified petition of any person or any relative or friend, that a person is an inhabitant or resident of the county and by reason of advanced age or physical disability is unable to manage his or her property; and

(2) The person, if not himself or herself the petitioner, voluntarily consents to the granting of the petition and, if able to attend, is produced before the court at the hearing.

**History.** Acts 1975, No. 372, § 1; A.S.A. 1947, § 57-701.

#### 28-67-104. Notice of hearing.

Notice of a hearing in a conservatorship proceeding shall be served upon the following who do not appear or in writing waive notice of hearing:

(1) The spouse, if any, of the person in question;



- (2) If there is no known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the person in question; and
- (3) Any other person designated by the court.

**History.** Acts 1975, No. 372, § 2; A.S.A. 1947, § 57-702.

### **28-67-105. Appointment.**

If, after a full hearing and examination upon the petition, it appears to the circuit court that the person in question is by reason of advanced age or physical disability unable to manage his or her property, the circuit court may appoint a conservator of his or her estate.

**History.** Acts 1975, No. 372, § 3; A.S.A. 1947, § 57-703.

## **CASE NOTES**

### **Effect on Testamentary Capacity.**

Lawyers were entitled to summary judgment with respect to claims filed by heirs alleging that the lawyers intentionally interfered with the heirs' inheritance because there was no evidence that the only lawyer who was involved with the will had acted by fraud, duress, or other tortious means to intentionally prevent the heirs from receiving an inheritance. To

the extent that a conservator had been appointed under this section to manage the decedent's financial affairs prior to the time she executed her will, that appointment did not, as a matter of law, mean that the decedent was incompetent to execute a will. *Yearly v. Baptist Health Found.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1376 (E.D. Ark. Jan. 7, 2008).

### **28-67-106. Persons ineligible as conservator.**

No person shall be appointed conservator of an estate who would be ineligible to act as guardian of the ward in such a case.

**History.** Acts 1975, No. 372, § 4; A.S.A. 1947, § 57-704.

### **28-67-107. Management of estate — Bond.**

(a) Every conservator appointed as provided in this chapter shall have the care, custody, and management of the estate of his or her ward until he or she is legally discharged.

(b) He or she must give bond to the State of Arkansas in like manner and with like conditions as provided for guardians of incompetent persons. However, the court may dispense with bond if the conservator is a bank or a trust company whose deposits are insured by the Federal Deposit Insurance Corporation or a trust company chartered and regulated by appropriate state authority.

**History.** Acts 1975, No. 372, § 5; A.S.A. 1947, § 57-705; Acts 1999, No. 635, § 2.

**28-67-108. Powers and duties.**

A conservator shall have the same powers and duties, except as to the custody of the person, as a guardian of an incompetent person.

**History.** Acts 1975, No. 372, § 6; A.S.A. 1947, § 57-706.

**28-67-109. Discharge.**

(a) A conservator may be discharged by the court upon the application of the ward or, otherwise, upon such notice to the conservator and next of kin of the ward as the court may determine reasonable and proper when it appears that the conservatorship is no longer necessary.

(b) In the event of death, resignation, or removal of a conservator, the court, on the application of the former ward and upon such notice to the next of kin of the ward as the court may order, may certify that the ward is discharged by operation of law if it appears that the conservatorship of the ward is no longer necessary.

**History.** Acts 1975, No. 372, § 7; A.S.A. 1947, § 57-707.

**28-67-110. Compensation.**

The conservator shall receive as compensation for his or her services the compensation provided by law for guardians.

**History.** Acts 1975, No. 372, § 8; A.S.A. 1947, § 57-708.

**28-67-111. Subsequent appointment of guardian — Effect.**

Any subsequent appointment of a guardian of the ward as an incompetent person shall be an appointment as guardian of the person, only, of the ward and shall not include the appointment of the guardian of the estate of the ward or in any manner affect the custody, management, and the handling of the estate of the ward by the conservator so long as the conservatorship proceedings are pending.

**History.** Acts 1975, No. 372, § 9; A.S.A. 1947, § 57-709.

**CHAPTER 68****UNIFORM POWER OF ATTORNEY ACT****SUBCHAPTER.**

1. GENERAL PROVISIONS.
  2. AUTHORITY.
  3. STATUTORY FORMS.
  4. MISCELLANEOUS PROVISIONS.
-



**Publisher's Notes.** This chapter was amended in its entirety by Acts 2011, No. 805.

**Effective Dates.** Acts 2011, No. 805, § 1: Jan. 1, 2012.

## SUBCHAPTER 1 — GENERAL PROVISIONS

### SECTION.

- 28-68-101. Short title.
- 28-68-102. Definitions.
- 28-68-103. Applicability.
- 28-68-104. Power of attorney is durable.
- 28-68-105. Execution of power of attorney.
- 28-68-106. Validity of power of attorney.
- 28-68-107. Meaning and effect of power of attorney.
- 28-68-108. Nomination of guardian — Relation of agent to court-appointed fiduciary.
- 28-68-109. When power of attorney effective.
- 28-68-110. Termination of power of attorney or agent's authority.
- 28-68-111. Coagents and successor agents.

### SECTION.

- 28-68-112. Reimbursement and compensation of agent.
- 28-68-113. Agent's acceptance.
- 28-68-114. Agent's duties.
- 28-68-115. Exoneration of agent.
- 28-68-116. Judicial relief.
- 28-68-117. Agent's liability.
- 28-68-118. Agent's resignation — Notice.
- 28-68-119. Acceptance of and reliance upon acknowledged power of attorney.
- 28-68-120. Liability for refusal to accept acknowledged statutory form power of attorney.
- 28-68-121. Principles of law and equity.
- 28-68-122. Laws applicable to financial institutions and entities.
- 28-68-123. Remedies under other law.

**Effective Dates.** Acts 2011, No. 805, § 1: Jan. 1, 2012.

### 28-68-101. Short title.

This chapter shall be known and may be cited as the Uniform Power of Attorney Act.

**History.** Acts 1981, No. 659, § 4; A.S.A. 1947, § 58-704; Acts 2011, No. 805, § 1. rewrote the section and the section heading.

**Amendments.** The 2011 amendment

### 28-68-102. Definitions.

In this chapter:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held



directly, indirectly, or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

**History.** Acts 2011, No. 805, § 1.

### **28-68-103. Applicability.**

This chapter applies to all powers of attorney except:

(1) a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(2) a power to make health-care decisions;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

(4) a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

**History.** Acts 2011, No. 805, § 1.

### **28-68-104. Power of attorney is durable.**

A power of attorney created under this chapter is durable unless it expressly provides that it is terminated by the incapacity of the principal.

**History.** Acts 2011, No. 805, § 1.

### **28-68-105. Execution of power of attorney.**

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

**History.** Acts 2011, No. 805, § 1.

### **28-68-106. Validity of power of attorney.**

(a) A power of attorney executed in this state on or after January 1, 2012, is valid if its execution complies with § 28-68-105.

(b) A power of attorney executed in this state before January 1, 2012, is valid if its execution complied with the law of this state as it existed at the time of execution.

(c) A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to § 28-68-107; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as it existed on January 1, 2011.

(d) Except as otherwise provided by statute other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

**History.** Acts 2011, No. 805, § 1.

### **28-68-107. Meaning and effect of power of attorney.**

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

**History.** Acts 2011, No. 805, § 1.

### **28-68-108. Nomination of guardian — Relation of agent to court-appointed fiduciary.**

(a) In a power of attorney, a principal may nominate a guardian of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

(b) If, after a principal executes a power of attorney, a court appoints a guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.

**History.** Acts 2011, No. 805, § 1.

### **28-68-109. When power of attorney effective.**

(a) A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

(b) If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

(c) If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is



unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a physician or licensed psychologist that the principal is incapacitated within the meaning of § 28-68-102(5)(A); or

(2) an attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of § 28-68-102(5)(B).

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as it existed on January 1, 2011, and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.

**History.** Acts 2011, No. 805, § 1.

### **28-68-110. Termination of power of attorney or agent's authority.**

(a) A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(b) An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated, or resigns;

(3) an action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

(c) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under subsection (b), notwithstanding a lapse of time since the execution of the power of attorney.

(d) Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(e) Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an

agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

(f) The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

**History.** Acts 2011, No. 805, § 1.

### **28-68-111. Coagents and successor agents.**

(a) A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

(b) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(c) Except as otherwise provided in the power of attorney and subsection (d), an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

(d) An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

**History.** Acts 2011, No. 805, § 1.

### **28-68-112. Reimbursement and compensation of agent.**

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

**History.** Acts 2011, No. 805, § 1.



**28-68-113. Agent's acceptance.**

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

**History.** Acts 2011, No. 805, § 1.

**28-68-114. Agent's duties.**

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's represen-

tation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

**History.** Acts 2011, No. 805, § 1.

### **28-68-115. Exoneration of agent.**

A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

**History.** Acts 2011, No. 805, § 1.

### **28-68-116. Judicial relief.**

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;



(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

**History.** Acts 2011, No. 805, § 1.

### **28-68-117. Agent's liability.**

An agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to:

(1) restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

**History.** Acts 2011, No. 805, § 1.

### **28-68-118. Agent's resignation — Notice.**

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) to the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(2) if there is no person described in paragraph (1), to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

**History.** Acts 2011, No. 805, § 1.

### **28-68-119. Acceptance of and reliance upon acknowledged power of attorney.**

(a) For purposes of this section and § 28-68-120, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgements.

(b) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine

may rely upon the presumption under § 28-68-105 that the signature is genuine.

(c) A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority.

(d) A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(e) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

(f) For purposes of this section and § 28-68-120, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal, or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

**History.** Acts 2011, No. 805, § 1.

### **28-68-120. Liability for refusal to accept acknowledged statutory form power of attorney.**

(a) In this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in § 28-68-301 or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as it existed on January 1, 2011.

(b) Except as otherwise provided in subsection (c):

(1) a person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation, or an opinion of counsel under § 28-68-119(d) no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation, or an opinion of counsel under § 28-68-119(d), the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, translation, or opinion of counsel; and



(3) a person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

(c) A person is not required to accept an acknowledged statutory form power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation, or an opinion of counsel under § 28-68-119(d) is refused;

(5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under § 28-68-119(d) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the Department of Human Services stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(d) A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

**History.** Acts 2011, No. 805, § 1.

## **28-68-121. Principles of law and equity.**

Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.

**History.** Acts 2011, No. 805, § 1.

## **28-68-122. Laws applicable to financial institutions and entities.**

This chapter does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with this chapter.

**History.** Acts 2011, No. 805, § 1.

**28-68-123. Remedies under other law.**

The remedies under this chapter are not exclusive and do not abrogate any right or remedy under the law of this state other than this chapter.

**History.** Acts 2011, No. 805, § 1.

**SUBCHAPTER 2 — AUTHORITY****SECTION.**

- 28-68-201. Authority that requires specific grant — Grant of general authority.
- 28-68-202. Incorporation of authority.
- 28-68-203. Construction of authority generally.
- 28-68-204. Real property.
- 28-68-205. Tangible personal property.
- 28-68-206. Stocks and bonds.
- 28-68-207. Commodities and options.
- 28-68-208. Banks and other financial institutions.
- 28-68-209. Operation of entity or business.

**SECTION.**

- 28-68-210. Insurance and annuities.
- 28-68-211. Estates, trusts, and other beneficial interests.
- 28-68-212. Claims and litigation.
- 28-68-213. Personal and family maintenance.
- 28-68-214. Benefits from governmental programs or civil or military service.
- 28-68-215. Retirement plans.
- 28-68-216. Taxes.
- 28-68-217. Gifts.

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**Effective Dates.** Acts 2011, No. 805,  
§ 1: Jan. 1, 2012.

**CASE NOTES**

**Cited:** *Filk v. Beatty*, 298 Ark. 40, 764 S.W.2d 454 (1989) (decision under prior law).

**28-68-201. Authority that requires specific grant — Grant of general authority.**

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (1) amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;
- (5) delegate authority granted under the power of attorney;



(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

(7) exercise fiduciary powers that the principal has authority to delegate.

(b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in §§ 28-68-204 — 28-68-216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to § 28-68-217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

**History.** Acts 1981, No. 659, 1; A.S.A. 1947, § 58-701; Acts 2011, No. 805, § 1.

rewrote the section and the section heading.

**Amendments.** The 2011 amendment

## CASE NOTES

### Application.

In a will contest, the facts showed that decedent's brother, as the attorney-in-fact, was not the maker of decedent's will, but merely acted as a conduit or messenger between the decedent and decedent's at-

torney concerning the decedent's wishes; thus, it was the decedent, and not his brother, who was the maker of the will. In re Estate of Garrett, 81 Ark. App. 212, 100 S.W.3d 72 (2003) (decision under prior law).

### 28-68-202. Incorporation of authority.

(a) An agent has authority described in this subchapter if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in §§ 28-68-204 — 28-68-217 or cites the section in which the authority is described.

(b) A reference in a power of attorney to general authority with respect to the descriptive term for a subject in §§ 28-68-204 — 28-68-217 or a citation to a section of §§ 28-68-204 — 28-68-217 incorporates the entire section as if it were set out in full in the power of attorney.

(c) A principal may modify authority incorporated by reference.

**History.** Acts 1981, No. 659, 2; A.S.A. rewrote the section and the section heading, § 58-702; Acts 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

### **28-68-203. Construction of authority generally.**

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in §§ 28-68-204 — 28-68-217 or that grants to an agent authority to do all acts that a principal could do pursuant to § 28-68-201(c), a principal authorizes the agent, with respect to that subject, to:

(1) demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release, or modify the contract or another contract made by or on behalf of the principal;

(3) execute, acknowledge, seal, deliver, file, or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(5) seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

(6) engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;

(7) prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal;

(9) access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means; and



(10) do any lawful act with respect to the subject and all property related to the subject.

**History.** Acts 1981, No. 659, 3; A.S.A. rewrote the section and the section heading. 1947, § 58-703; Acts 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

## **28-68-204. Real property.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

(1) demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject an interest in real property or a right incident to real property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with them; and

(D) purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(A) selling or otherwise disposing of them;

(B) exercising or selling an option, right of conversion, or similar right with respect to them; and

(C) exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property; and

(9) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

**History.** Acts 2011, No. 805, § 1.

### **28-68-205. Tangible personal property.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

(1) demand, buy, receive, accept as a gift or as security for an extension of credit, or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

(2) sell; exchange; convey with or without covenants, representations, or warranties; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or, otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

(5) manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(A) insuring against liability or casualty or other loss;

(B) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(C) paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(D) moving the property from place to place;

(E) storing the property for hire or on a gratuitous bailment; and

(F) using and making repairs, alterations, or improvements to the property; and

(6) change the form of title of an interest in tangible personal property.

**History.** Acts 2011, No. 805, § 1.



**28-68-206. Stocks and bonds.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

- (1) buy, sell, and exchange stocks and bonds;
- (2) establish, continue, modify, or terminate an account with respect to stocks and bonds;
- (3) pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;
- (4) receive certificates and other evidences of ownership with respect to stocks and bonds; and
- (5) exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

**History.** Acts 2011, No. 805, § 1.

**28-68-207. Commodities and options.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

- (1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and
- (2) establish, continue, modify, and terminate option accounts.

**History.** Acts 2011, No. 805, § 1.

**28-68-208. Banks and other financial institutions.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

- (1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;
- (2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;
- (3) contract for services available from a financial institution, including renting a safe deposit box or space in a vault;
- (4) withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;
- (5) receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them;
- (6) enter a safe deposit box or vault and withdraw or add to the contents;

(7) borrow money and pledge as security personal property of the principal necessary to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(8) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) receive for the principal and act upon a sight draft, warehouse receipt, or other document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;

(10) apply for, receive, and use letters of credit, credit and debit cards, electronic transaction authorizations, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

(11) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

**History.** Acts 2011, No. 805, § 1.

## **28-68-209. Operation of entity or business.**

Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

(5) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds;

(6) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

(7) with respect to an entity or business owned solely by the principal:



(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(B) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried; and

(v) the mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other advisors;

(C) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(8) put additional capital into an entity or business in which the principal has an interest;

(9) join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business;

(10) sell or liquidate all or part of an entity or business;

(11) establish the value of an entity or business under a buy-out agreement to which the principal is a party;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an entity or business and make related payments; and

(13) pay, compromise, or contest taxes, assessments, fines, or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

**History.** Acts 2011, No. 805, § 1.

## **28-68-210. Insurance and annuities.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

(1) continue, pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment;

(3) pay the premium or make a contribution on, modify, exchange, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) apply for and receive a loan secured by a contract of insurance or annuity;

(5) surrender and receive the cash surrender value on a contract of insurance or annuity;

(6) exercise an election;

(7) exercise investment powers available under a contract of insurance or annuity;

(8) change the manner of paying premiums on a contract of insurance or annuity;

(9) change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

(10) apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(12) select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

(13) pay, from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

**History.** Acts 2011, No. 805, § 1.

### **28-68-211. Estates, trusts, and other beneficial interests.**

(a) In this section, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be, entitled to a share or payment.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust, or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;



(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation to remove, substitute, or surcharge a fiduciary;

(6) conserve, invest, disburse, or use anything received for an authorized purpose;

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settlor; and

(8) reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest.

**History.** Acts 2011, No. 805, § 1.

## **28-68-212. Claims and litigation.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

(1) assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) bring an action to determine adverse claims or intervene or otherwise participate in litigation;

(3) seek an attachment, garnishment, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination, and bind the principal in litigation;

(5) submit to alternative dispute resolution, settle, and propose or accept a compromise;

(6) waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other

instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value;

(8) pay a judgment, award, or order against the principal or a settlement made in connection with a claim or litigation; and

(9) receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

**History.** Acts 2011, No. 805, § 1.

### **28-68-213. Personal and family maintenance.**

(a) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, whether living when the power of attorney is executed or later born:

(A) the principal's children;

(B) other individuals legally entitled to be supported by the principal; and

(C) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in paragraph (1) by:

(A) purchase, lease, or other contract; or

(B) paying the operating costs, including interest, amortization payments, repairs, improvements, and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs for the individuals described in paragraph (1);

(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in paragraph (1);

(6) act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as it existed on January 1, 2011, and applicable regulations, in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone



authorized under the law of this state to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in paragraph (1);

(8) maintain credit and debit accounts for the convenience of the individuals described in paragraph (1) and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order, or other organization or to continue contributions to those organizations.

(b) Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under this chapter.

**History.** Acts 2011, No. 805, § 1.

#### **28-68-214. Benefits from governmental programs or civil or military service.**

(a) In this section, “benefits from governmental programs or civil or military service” means any benefit, program, or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in § 28-68-213(a)(1), and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal’s behalf, a benefit or program;

(4) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in paragraph (4) and conserve, invest, disburse, or use for a lawful purpose anything so received.

**History.** Acts 2011, No. 805, § 1.

### **28-68-215. Retirement plans.**

(a) In this section, “retirement plan” means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Internal Revenue Code Section 408, 26 U.S.C. Section 408, as it existed on January 1, 2011;

(2) a Roth individual retirement account under Internal Revenue Code Section 408A, 26 U.S.C. Section 408A, as it existed on January 1, 2011;

(3) a deemed individual retirement account under Internal Revenue Code Section 408(q), 26 U.S.C. Section 408(q), as it existed on January 1, 2011;

(4) an annuity or mutual fund custodial account under Internal Revenue Code Section 403(b), 26 U.S.C. Section 403(b), as it existed on January 1, 2011;

(5) a pension, profit-sharing, stock bonus, or other retirement plan qualified under Internal Revenue Code Section 401(a), 26 U.S.C. Section 401(a), as it existed on January 1, 2011;

(6) a plan under Internal Revenue Code Section 457(b), 26 U.S.C. Section 457(b), as it existed on January 1, 2011; and

(7) a nonqualified deferred compensation plan under Internal Revenue Code Section 409A, 26 U.S.C. Section 409A, as it existed on January 1, 2011.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal’s name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to, or purchase assets from a retirement plan.

**History.** Acts 2011, No. 805, § 1.



**28-68-216. Taxes.**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

(1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, property, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Internal Revenue Code Section 2032A, 26 U.S.C. Section 2032A, as it existed on January 1, 2011, closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following 25 tax years;

(2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) exercise any election available to the principal under federal, state, local, or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority.

**History.** Acts 2011, No. 805, § 1.

**28-68-217. Gifts.**

(a) In this section, a gift “for the benefit of” a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529, as it existed on January 1, 2011.

(b) Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to, or for the benefit of, a person, a gift of any of the principal’s property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), as it existed on January 1, 2011, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, as it existed on January 1, 2011, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, as it existed on January 1, 2011, to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(c) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

- (1) the value and nature of the principal's property;
- (2) the principal's foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and
- (5) the principal's personal history of making or joining in making gifts.

**History.** Acts 2011, No. 805, § 1.

### SUBCHAPTER 3 — STATUTORY FORMS

SECTION.

28-68-301. Statutory form power of attorney.

SECTION.

28-68-302. Agent's certification.

28-68-303 — 28-68-313. [Repealed.]

**Effective Dates.** Acts 1965, No. 61, § 14: Feb. 12, 1965. Emergency clause provided: "It is hereby found and determined by the General Assembly that the guardianship laws of this State have of necessity become very formalized and the appointment of a guardian has become quite expensive; that the laws of this State provide no simple and inexpensive method whereby persons of limited means may, in anticipation of infirmity resulting from injury, old age, senility, blindness,

disease or other related cause, provide for the care of his person or property or both; and that this Act will remedy this situation by providing a simplified procedure for executing a special power of attorney for small property interests. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health, and safety shall be in effect from the date of its passage and approval."

Acts 2011, No. 805, § 1: Jan. 1, 2012.

### CASE NOTES

**Cited:** *Filk v. Beatty*, 298 Ark. 40, 764 S.W.2d 454 (1989) (decision under prior law).

#### 28-68-301. Statutory form power of attorney.

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this chapter.



ARKANSAS  
STATUTORY FORM POWER OF ATTORNEY  
IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act, Arkansas Code Title 28, Chapter 68.

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent’s authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

**If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.**

DESIGNATION OF AGENT

I \_\_\_\_\_ name the  
                    (Name of Principal)  
following person as my agent:

Name of Agent: \_\_\_\_\_  
Agent’s Address: \_\_\_\_\_  
Agent’s Telephone Number: \_\_\_\_\_

## DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: \_\_\_\_\_

Successor Agent's Address: \_\_\_\_\_

Successor Agent's Telephone Number: \_\_\_\_\_

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: \_\_\_\_\_

Second Successor Agent's Address: \_\_\_\_\_

Second Successor Agent's Telephone Number: \_\_\_\_\_

## GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act, Arkansas Code Title 28, Chapter 68:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

- ☐ Real Property
- ☐ Tangible Personal Property
- ☐ Stocks and Bonds
- ☐ Commodities and Options
- ☐ Banks and Other Financial Institutions
- ☐ Operation of Entity or Business
- ☐ Insurance and Annuities
- ☐ Estates, Trusts, and Other Beneficial Interests
- ☐ Claims and Litigation
- ☐ Personal and Family Maintenance
- ☐ Benefits from Governmental Programs or Civil or Military Service
- ☐ Retirement Plans
- ☐ Taxes
- ☐ All Preceding Subjects

## GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:



(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- ☐ Amend, revoke, or terminate an inter vivos trust
- ☐ Make a gift, subject to the limitations of § 28-68-217 of the Uniform Power of Attorney Act and any special instructions in this power of attorney
- ☐ Create or change rights of survivorship
- ☐ Create or change a beneficiary designation
- ☐ Authorize another person to exercise the authority granted under this power of attorney
- ☐ Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- ☐ Exercise fiduciary powers that the principal has authority to delegate

LIMITATION ON AGENT’S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a guardian of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of Nominee for guardian of my estate:\_\_\_\_\_

Nominee’s Address:\_\_\_\_\_

Nominee’s Telephone Number:\_\_\_\_\_

Name of Nominee for guardian of my person:\_\_\_\_\_

Nominee's Address: \_\_\_\_\_  
Nominee's Telephone Number: \_\_\_\_\_

### RELiance ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

### SIGNATURE AND ACKNOWLEDGMENT

\_\_\_\_\_  
Your Signature \_\_\_\_\_ Date \_\_\_\_\_

\_\_\_\_\_  
Your Name Printed

\_\_\_\_\_  
Your Address

\_\_\_\_\_  
Your Telephone Number

State of \_\_\_\_\_

County of \_\_\_\_\_

This document was acknowledged before me on \_\_\_\_\_,  
(Date)

by \_\_\_\_\_  
(Name of Principal)

\_\_\_\_\_  
Signature of Notary (Seal, if any)

My commission expires: \_\_\_\_\_

### IMPORTANT INFORMATION FOR AGENT

#### Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) act in good faith;
- (3) do nothing beyond the authority granted in this power of attorney; and



(4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as “agent” in the following manner:

(Principal’s Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) act loyally for the principal’s benefit;
- (2) avoid conflicts that would impair your ability to act in the principal’s best interest;
- (3) act with care, competence, and diligence;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal’s expectations, to act in the principal’s best interest; and
- (6) attempt to preserve the principal’s estate plan if you know the plan and preserving the plan is consistent with the principal’s best interest.

### Termination of Agent’s Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) death of the principal;
- (2) the principal’s revocation of the power of attorney or your authority;
- (3) the occurrence of a termination event stated in the power of attorney;
- (4) the purpose of the power of attorney is fully accomplished; or
- (5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

### Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act, Arkansas Code Title 28, Chapter 68. If you violate the Uniform Power of Attorney Act, Arkansas Code Title 28, Chapter 68, or act outside the authority granted, you may be liable for any damages caused by your violation.

**If there is anything about this document or your duties that you do not understand, you should seek legal advice.**

**History.** Acts 1965, No. 61, § 11; A.S.A. 1947, § 58-511; Acts 2011, No. 805, § 1. rewrote the section and the section heading.  
**Amendments.** The 2011 amendment

**28-68-302. Agent's certification.**

The following optional form may be used by an agent to certify facts concerning a power of attorney.

**AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY**

State of \_\_\_\_\_  
County of \_\_\_\_\_

I, \_\_\_\_\_ (Name of Agent), certify under penalty of perjury that \_\_\_\_\_ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

- I further certify that to my knowledge:
- (1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
  - (2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
  - (3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and
  - (4) \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

(Insert other relevant statements)

**SIGNATURE AND ACKNOWLEDGMENT**

\_\_\_\_\_  
Agent's Signature \_\_\_\_\_  
Date

\_\_\_\_\_  
Agent's Name Printed

\_\_\_\_\_  
Agent's Address

\_\_\_\_\_  
Agent's Telephone Number

This document was acknowledged before me on \_\_\_\_\_,  
(Date)



by \_\_\_\_\_  
(Name of Agent)

(Seal, if any)

\_\_\_\_\_  
Signature of Notary

My commission expires: \_\_\_\_\_

**History.** Acts 1965, No. 61, § 10; A.S.A. 1947, § 58-510; Acts 2011, No. 805, § 1.

**Amendments.** The 2011 amendment rewrote the section and the section heading.

**28-68-303 — 28-68-313. [Repealed.]**

**A.C.R.C. Notes.** Although Acts 2011, No. 805, § 1, stated that “Arkansas Code Title 28, Chapter 68, is amended to read as follows:”, indicating that the entire chapter was being amended, one of the sections in that chapter, § 28-68-303, was omitted from the act. Because the subject matter of § 28-68-303 would not be compatible with Chapter 68 as amended by Acts 2011, No. 805, the omission of § 28-68-303 from the act indicates a repeal of that section.

**Publisher’s Notes.** These sections, concerning powers of attorney for small property interests, were repealed by Acts 2011, No. 805, § 1. The sections were derived from the following sources:

28-68-303. Acts 1965, No. 61, § 4; 1975, No. 253, § 1; A.S.A. 1947, § 58-504.

28-68-304. Acts 1965, No. 61, § 1; A.S.A. 1947, § 58-501; Acts 2003, No. 1185, § 283.

28-68-305. Acts 1965, No. 61, § 2; A.S.A. 1947, § 58-502.

28-68-306. Acts 1965, No. 61, §§ 1, 2; A.S.A. 1947, §§ 58-501, 58-502.

28-68-307. Acts 1965, No. 61, § 3; A.S.A. 1947, § 58-503; Acts 2003, No. 1185, § 284.

28-68-308. Acts 1965, No. 61, §§ 3, 4, 7; 1975, No. 253, § 1; A.S.A. 1947, §§ 58-503, 58-504, 58-507.

28-68-309. Acts 1965, No. 61, § 9; A.S.A. 1947, § 58-509.

28-68-310. Acts 1965, No. 61, § 8; A.S.A. 1947, § 58-508.

28-68-311. Acts 1965, No. 61, § 6; A.S.A. 1947, § 58-506.

28-68-312. Acts 1965, No. 61, § 6; A.S.A. 1947, § 58-506.

28-68-313. Acts 1965, No. 61, § 5; A.S.A. 1947, § 58-505.

**SUBCHAPTER 4 — MISCELLANEOUS PROVISIONS**

SECTION.

28-68-401. Uniformity of application and construction.

28-68-402. Relation to Electronic Signatures in Global and National Commerce Act.

SECTION.

28-68-403. Effect on existing powers of attorney.

28-68-404. [Reserved.]

28-68-405. Effective date.

28-68-406 — 28-68-419. [Repealed.]

**Effective Dates.** Acts 2011, No. 805, § 1: Jan. 1, 2012.

**28-68-401. Uniformity of application and construction.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

**History.** Acts 1999, No. 1423, § 1; rewrote the section and the section heading. 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

**CASE NOTES**

**Cited:** Vogelgesang v. U. S. Bank, N.A., 92 Ark. App. 116, 211 S.W.3d 575 (2005) (decision under prior law).

**28-68-402. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., as it existed on January 1, 2011, but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**History.** Acts 1999, No. 1426, § 2; rewrote the section and the section heading. 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

**28-68-403. Effect on existing powers of attorney.**

Except as otherwise provided in this chapter, on January 1, 2012:

(1) this chapter applies to a power of attorney created before, on, or after January 1, 2012;

(2) this chapter applies to a judicial proceeding concerning a power of attorney commenced on or after January 1, 2012;

(3) this chapter applies to a judicial proceeding concerning a power of attorney commenced before January 1, 2012, unless the court finds that application of a provision of this chapter would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

(4) an act done before January 1, 2012, is not affected by this chapter.

**History.** Acts 1999, No. 1423, § 3; rewrote the section and the section heading. 2011, No. 805, § 1.

**Amendments.** The 2011 amendment



28-68-404. [Reserved.]

**History.** Acts 1999, No. 1423, § 4; 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

deleted the text of the section and the section heading and reserved the section number.

28-68-405. Effective date.

This chapter takes effect January 1, 2012.

**History.** Acts 1999, No. 1423, § 5; 2011, No. 805, § 1.

**Amendments.** The 2011 amendment

rewrote the section and the section heading.

28-68-406 — 28-68-419. [Repealed.]

**Publisher’s Notes.** These sections concerning the Uniform Statutory Form Power of Attorney Act, were repealed by Acts 2011, No. 805, § 1. The sections were derived from the following sources:

28-68-406. Acts 1999, No. 1423, § 6.  
28-68-407. Acts 1999, No. 1423, § 7.  
28-68-408. Acts 1999, No. 1423, § 8.  
28-68-409. Acts 1999, No. 1423, § 9.  
28-68-410. Acts 1999, No. 1423, § 10.

28-68-411. Acts 1999, No. 1423, § 11.  
28-68-412. Acts 1999, No. 1423, § 12.  
28-68-413. Acts 1999, No. 1423, § 13.  
28-68-414. Acts 1999, No. 1423, § 14.  
28-68-415. Acts 1999, No. 1423, § 15.  
28-68-416. Acts 1999, No. 1423, § 16.  
28-68-417. Acts 1999, No. 1423, § 17.  
28-68-418. Acts 1999, No. 1423, § 18.  
28-68-419. Acts 1999, No. 1423, § 19.

CHAPTER 69

FIDUCIARIES GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. BANKS AND TRUST COMPANIES.
3. INCORPORATION OF POWERS BY REFERENCE.
4. REVOCATION, MODIFICATION, OR TERMINATION OF TRUST.
5. RETIREMENT PLAN — SPENDTHRIFT TRUST.
6. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT. [REPEALED.]
7. TRUSTEE DIVISION OF TRUSTS ACT.
8. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

28-69-101. Trust funds — Deposit for safekeeping.

SECTION.

28-69-102. Definitions.

**Effective Dates.** Acts 1993, No. 1228, § 5: Apr. 20, 1993. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that the Medicaid eligibility laws of this state are in immediate need of

amendment to comply with federal requirements and assure that otherwise ineligible individuals are prevented from artificially impoverishing themselves to receive benefits to which they are not otherwise entitled and to facilitate recov-

ery of improperly obtained benefits and assure the fiscal integrity of the funds appropriated for Medicaid and this Act is necessary to accomplish that purpose. Therefore, an emergency is hereby de-

clared to exist and this Act being immediately necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

### 28-69-101. Trust funds — Deposit for safekeeping.

It shall be lawful for any party of whom a bond, undertaking, or other obligation is required to agree with his or her surety for the deposit of any or all moneys and assets for which he or she and his or her surety are or may be held responsible with a bank, savings bank, safe-deposit or trust company authorized by law to do business as such, or with any other depository approved by the court or a judge thereof, if the deposit is otherwise proper, for the safekeeping of the assets in such manner as to prevent the withdrawal of the money or assets or any part of them, without the written consent of the surety, or an order of court or a judge made on such notice to the surety as the court or judge may direct. However, the agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the bond.

**History.** Acts 1947, No. 94, § 1; A.S.A. 1947, § 58-105.

surety of personal representative as to deposits of trust funds, § 28-48-209.

**Cross References.** Agreement with

### RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** The Arkansas Trust Code: Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.

### 28-69-102. Definitions.

(a) As used in this section:

(1) "Trust" means a trust, or similar legal device, established other than by will by an individual or an individual's spouse under which the individual may be a beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one (1) or more trustees or other fiduciaries who are permitted to exercise any discretion with respect to the distribution to the individual, and shall include trusts, conservatorships, and estates created pursuant to the administration of a guardianship;

(2) "Grantor" means the individual, institution, or entity that established, created, or funded the trust and shall also include fiduciaries as defined by § 28-69-201 and third parties as contemplated by § 20-77-301 et seq.

(b) A provision in a trust, other than a testamentary trust, which limits the availability of, or provides directly or indirectly for the suspension, termination, or diversion of the principal, income, or



beneficial interest of either the grantor or the grantor's spouse in the event that the grantor or grantor's spouse should apply for medical assistance or require medical, hospital, or nursing care or long-term custodial, nursing, or medical care shall be void as against the public policy of the State of Arkansas without regard to the irrevocability of the trust or the purpose for which the trust was created and without regard to whether the trust was created pursuant to court order.

(c) Subsection (b) of this section is remedial in nature and is enacted to prevent individuals otherwise ineligible for medical assistance benefits from making themselves eligible by creating trusts in order to preserve their assets.

**History.** Acts 1993, No. 1228, § 1.

### CASE NOTES

#### ANALYSIS

**In General.**

Discretion of Trustee.

Grantor.

Medical Benefits.

Public Policy.

Retroactive Application.

#### **In General.**

Without question, this section serves the general welfare of the public. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993).

#### **Discretion of Trustee.**

Where provisions of a trust relating to the safeguarding of government benefits ran afoul of the public policy as expressed in this section, and for that reason, they were void and unenforceable under this section, the discretion in the trustee to apply trust resources for beneficiary's benefit was comprehensive. *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 894 S.W.2d 584 (1995).

#### **Grantor.**

Alleged status as grantor did not take the matter out from under this section where settlement proceeds to meet beneficiary's medical and custodial needs ultimately belonged to him or to the guardian of his estate; the third party's role as the grantor of this trust was something of a guise. *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 894 S.W.2d 584 (1995).

#### **Medical Benefits.**

Where grantor's trust prevented the trustee from distributing the principal of the trust until grantor's death, but no provision in the trust limited the availability of, or provided directly or indirectly for the suspension, termination, or diversion of the principal, income, or beneficial interest of the grantor, she was not disqualified from receiving Medicaid benefits. *Arkansas Dep't of Human Servs. v. Wilson*, 323 Ark. 151, 913 S.W.2d 783 (1996).

#### **Public Policy.**

Provisions in trusts that limit the availability of funds should the grantor apply for medical assistance or require medical or long-term care are void as against public policy. *Arkansas Dep't of Human Servs. v. Wilson*, 323 Ark. 151, 913 S.W.2d 783 (1996).

A retroactive application of this section would not disturb a contractual right, or create a new obligation. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993).

The department's regulations in effect before this section was enacted did not expressly prohibit a person from artificially impoverishing himself or herself in order to become eligible for Medicaid; the General Assembly, without question, intended to put an end to such contrivances. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993).

The event that determines whether the application of this section is prospective or

retroactive is the determination of eligibility of the individual for welfare; that determination could be made periodically with the outcome being dependent on the amount of resources and income the individual had at that time. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993).

### **Retroactive Application.**

The legislative intent was to give this section retroactive effect; the legislative intent may be given effect, and this section may be applied retroactively. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993).

## **SUBCHAPTER 2 — BANKS AND TRUST COMPANIES**

### **SECTION.**

- 28-69-201. Definition.
- 28-69-202. Common trust funds.
- 28-69-203. Investments generally — Liability.
- 28-69-204. Registration or transfer of investments — Liability of third parties.

### **SECTION.**

- 28-69-205. Investment in obligations of certain banks authorized.
- 28-69-206. Deposit of funds — Collateral for uninsured deposit.
- 28-69-207. Services provided by affiliates.

**Publisher's Notes.** For Comments regarding the Uniform Common Trust Fund Act, see Commentaries Volume B.

**Cross References.** Foreign banks and trust companies as fiduciaries, § 4-27-201 et seq.

Limited relaxation of the prudent person rule for fiduciaries and financial institutions, § 28-71-107.

**Effective Dates.** Acts 1947, No. 394, § 10: effective July 1, 1947, and applicable to fiduciary relationships then in existence or thereafter established.

Acts 1985, No. 947, § 4: Apr. 15, 1985. Emergency clause provided: "It is ascertained and determined by the General Assembly of the State of Arkansas that it is in the public interest to permit trust departments of banks which are members of an affiliated group to use a single common trust fund, which will be for the benefit of fiduciaries and beneficiaries.

Therefore, an emergency is hereby declared to exist and this enactment being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 351, § 4: Mar. 6, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that banks located in this State should be authorized to utilize their affiliates to perform services for a trust administered by the banks; that such authorization will be more efficient and economical for all parties; that this Act grants such authority and therefore should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

### **28-69-201. Definition.**

For the purposes of this subchapter, unless the context otherwise requires, "fiduciary" includes a trustee under any express trust, executor, administrator, guardian, curator, or agent. For the purposes of § 28-69-204 "fiduciary" also includes a trustee under an implied, resulting, or constructive trust, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a public or



private corporation, public officer, nominee, or any other person acting in a fiduciary capacity for any person, trust, or estate.

**History.** Acts 1947, No. 394, § 7; 1975, No. 387, § 1; A.S.A. 1947, § 58-112.

### **28-69-202. Common trust funds.**

(a)(1) Any trust department of a state bank, national bank, or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others as co-fiduciaries. The bank or trust company, as fiduciary or co-fiduciary, may invest funds which it lawfully holds for investment in interests in such common trust funds if the investment is not prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciary or co-fiduciaries to the investment.

(2) For purposes of this subchapter, the term "trust department" or "trust company" shall include two (2) or more trust departments or trust companies which are members of the same "affiliated group" as defined in § 1504 of the Internal Revenue Code, as amended, with respect to any fund established pursuant to this subsection of which any of the trust departments or trust companies is trustee or of which two (2) or more of the trust departments or trust companies are co-trustees.

(b) Unless ordered by a court of competent jurisdiction, the bank or trust company operating common trust funds is not required to render a court accounting with regard to such funds. However, the bank or trust company may, by application to the circuit court of the county in which it has its place of business, secure approval of such an accounting on such conditions as the court may establish.

**History.** Acts 1947, No. 394, §§ 5, 6; 1985, No. 947, § 1; A.S.A. 1947, §§ 58-110, 58-111.

**U.S. Code.** Section 1504 of the Internal Revenue Code referred to in this section is codified as 26 U.S.C. § 1504.

### **RESEARCH REFERENCES**

**U. Ark. Little Rock L.J.** Legislative Survey, Banking Law, 8 U. Ark. Little Rock L.J. 547.

### **28-69-203. Investments generally — Liability.**

(a) Any state bank, national bank, or trust company authorized to do business in this state when acting as a fiduciary or as a co-fiduciary with others, with the consent of its co-fiduciary, if any, who are authorized to give such consent, may cause any investment held in any fiduciary capacity to be registered and held in the name of a nominee or nominees of the bank or trust company.

(b) The records of the bank or trust company shall at all times show the ownership of any such investment.

(c) The investments shall at all times be kept separate and apart from the assets of the bank or trust company.

(d)(1) Any bank or trust company shall be absolutely liable for any loss occasioned by the acts of any nominees of the bank or trust company with respect to any investment so registered.

(2) However, no liability for any loss occasioned by the acts of any bank or trust company, or the nominee of either of them with respect to the investments so registered, shall be imposed upon any corporation or its transfer agent or registrar which registers its stock or other securities in the name of the bank or trust company, or the nominee of either of them, in accordance with the provisions of this section.

**History.** Acts 1947, No. 394, §§ 1-3;  
A.S.A. 1947, §§ 58-106 — 58-108.

#### RESEARCH REFERENCES

U. Ark. Little Rock L.J. Jans, Survey  
of Decedents' Estates, 3 U. Ark. Little  
Rock L.J. 216.

### **28-69-204. Registration or transfer of investments — Liability of third parties.**

If a fiduciary or the nominee of a fiduciary in whose name are registered, or are to be registered, any shares of stocks, bonds, or other securities of any public or private corporation, company, other association, or of any trust, applies for the registration or transfer of the shares, then the corporation, company, other association, or any of the managers of the trust or its or their transfer agent, is not bound to inquire whether the fiduciary or nominee is committing a breach of his or her obligation as fiduciary or nominee in making the registration or transfer nor to see to the performance of the fiduciary obligation. The corporation, company, other association, or any of the managers of the trust, or its or their transfer agent, are liable for the registration or transfer only where the registration or transfer is made with actual knowledge that the fiduciary or nominee is committing a breach of trust in requesting the registration or transfer or with knowledge of the facts that its or their participation in the registration or transfer amounts to bad faith.

**History.** Acts 1947, No. 394, § 4; A.S.A.  
1947, § 58-109.

### **28-69-205. Investment in obligations of certain banks authorized.**

Notwithstanding any other provision of law, any funds, including capital, belonging to or under the control of any bank, trust company,



savings bank, or savings institution and any funds belonging to or under the control of any administrators, executors, trustees, fiduciaries, guardians, or curators of the estates of minors or insane persons may be invested in obligations issued, assumed, or guaranteed by the International Bank for Reconstruction and Development, by the Inter-American Development Bank, by the Asian Development Bank, or by the African Development Bank.

**History.** Acts 1949, No. 453, § 1; 1969, No. 349, § 1; 1973, No. 522, § 1; 1985, No. 943, § 1; A.S.A. 1947, § 58-113.

### **28-69-206. Deposit of funds — Collateral for uninsured deposit.**

An Arkansas-chartered bank or savings and loan association which holds as trustee funds awaiting investment or distribution, if not prohibited by the instrument or judgment creating the trust, may deposit the funds in the commercial department of the bank or savings and loan association. However, if the amount of the deposit exceeds the Federal Deposit Insurance Corporation or Federal Savings and Loan Insurance Corporation insurance coverage, the bank or savings and loan association shall pledge, as security for the payment of the deposit, bonds constituting general obligations of the United States or the State of Arkansas of a market value not less than the uninsured portion of the deposit.

**History.** Acts 1981, No. 837, § 1; A.S.A. 1947, § 58-120. in savings and loan associations, § 23-37-512.

**Cross References.** Legal investments

### **28-69-207. Services provided by affiliates.**

Any state bank, national bank, or trust company qualified to act as a fiduciary in this state, is hereby specifically authorized to utilize its respective affiliates to provide services for any trust or estate for which the financial institution or trust company acts as a trustee or other fiduciary, provided the financial institution believes, in the exercise of the standard of care described in § 28-71-105, that the services are reasonably necessary and that its affiliate can render such services, including, but not limited to, securities brokerage services, computer services, and banking services, to the trust or estate as competently as similar services rendered by nonaffiliates and for compensation equal to or less than that charged by nonaffiliates. Provided the foregoing requirements are met, an affiliate may be utilized by the financial institution or trust company without the approval or consent of any person or specific authorization in the trust instrument, unless such a power is expressly withheld in the trust instrument.

**History.** Acts 1989, No. 351, § 1.

**SUBCHAPTER 3 — INCORPORATION OF POWERS BY REFERENCE**

## SECTION.

28-69-301. Definitions.

28-69-302. Power of court over fiduciary unaffected.

28-69-303. Incorporation by reference authorized — Effect.

## SECTION.

28-69-304. Powers which may be incorporated.

28-69-305. Compliance with environmental law.

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**RESEARCH REFERENCES**

**ALR.** Sufficiency of exercise of power specifying that it can be exercised only by specific or direct reference thereto. 15 A.L.R.4th 810.

**Am. Jur.** 62 Am. Jur. 2d, Powers, § 1 et seq.

**Ark. L. Rev.** Some Practical Aspects to Drafting in the Estate Planning Field, 21 Ark. L. Rev. 5.

The Arkansas Fiduciary Powers Act of 1961, 22 Ark. L. Rev. 426.

**C.J.S.** 72 C.J.S., Powers, § 1 et seq.

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**28-69-301. Definitions.**

As used in this subchapter:

(1) "Environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health;

(2) "Estate" means the estate of the decedent if by reference thereto a provision has been made applicable to the executor or executors of a will and means the trust estate if by reference thereto a provision has been made applicable to the trustee or trustees of such an estate;

(3) "Fiduciary", and the masculine singular form of the pronoun referring to the fiduciary, means the one (1) or more executors, whether male, female, or corporate, of the estate of a decedent, or the one (1) or more trustees, whether male, female, or corporate, of a testamentary or inter vivos trust estate, whichever in a particular case shall be appropriate; and

(4) "Hazardous substance" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law.

**History.** Acts 1961, No. 153, §§ 1, 2; A.S.A. 1947, §§ 58-114, 58-115; Acts 1993, No. 421, § 2.

**28-69-302. Power of court over fiduciary unaffected.**

Nothing contained in this subchapter shall be construed to limit the power of a court of competent jurisdiction to prohibit a fiduciary from taking any action or to restrain a fiduciary in the taking of such an action, notwithstanding the authorizations or powers vested in the



fiduciary by any written instrument wherein all or any part of § 28-69-304 is incorporated by reference.

**History.** Acts 1961, No. 153, § 4; A.S.A. 1947, § 58-117.

### **28-69-303. Incorporation by reference authorized — Effect.**

(a) By a clearly expressed intention of the testator or settlor so to do contained in a will or in an instrument in writing whereby a trust estate is created inter vivos, the language contained in the introductory paragraph of § 28-69-304 and in any one (1) or more of the subdivisions of that section may be incorporated, with appropriate reference made to § 28-69-304, in the will or other written instrument, to be applicable either to the fiduciary authorized to administer the estate of the testator or to the fiduciary authorized to administer a trust estate established or to be established pursuant to the terms of the will or other written instrument, or applicable to both types of fiduciaries, with the same effect and subject to the same judicial interpretation and control in appropriate cases as though the language were set forth verbatim in the instrument.

(b) However, the language contained in § 28-69-304(1)-(4) is appropriate only with respect to powers to be vested in the one (1) or more executors of the estate of a decedent and is available only for incorporation by reference in a will as powers of the executor or executors of the will.

**History.** Acts 1961, No. 153, § 2; A.S.A. 1947, § 58-115.

### **RESEARCH REFERENCES**

**Ark. L. Rev.** Note, Incorporation by Wills in *Gifford v. Estate of Gifford*, 46 Reference, Integration, and Holographic Ark. L. Rev. 1013.

### **28-69-304. Powers which may be incorporated.**

Without diminution or restriction of the powers vested in him or her by law, or elsewhere in this instrument, and subject to all other provisions of this instrument, the fiduciary, without the necessity of procuring any judicial authorization therefor, or approval thereof, shall be vested with, and in the application of his or her best judgment and discretion in behalf of the beneficiaries of this instrument shall be authorized to exercise, the powers hereunder specifically enumerated:

(1) In behalf of my estate to join my spouse, if living, or the personal representative of the estate of my spouse, if deceased, in the execution and filing of a joint income tax return to the United States, or to the State of Arkansas, or any other governmental taxing authority or a joint gift tax return, if and when a joint return is authorized by law, if the fiduciary, in the exercise of his or her best judgment, believes the action to be for the best interests of my estate, or will result in a benefit to my

spouse or the estate of my spouse exceeding in amount any monetary loss to my estate which may be caused thereby;

(2) To continue, to the extent and so long as in the exercise of the fiduciary's best judgment it is advisable and for the best interests of my estate so to do, the operation or participation in the operation of any farming, manufacturing, mercantile, and other business activity or enterprise in which at the time of my death I am engaged, either alone or in unincorporated association with others;

(3) On behalf of my estate, to perform any and all valid executory contracts to which, at the time of my death, I am a party, and which at the time of my death have not been fully performed by me, and to discharge all obligations of my estate arising under or by reason of such contracts;

(4) Pending the administration of my estate, to permit any beneficiary or beneficiaries of this will to have the use, possession, and enjoyment, without charge made therefor, and without the fiduciary's thereby relinquishing control thereof, of any real property or tangible personal property of my estate which, upon completion of the administration of my estate, will be distributable to the beneficiary or beneficiaries, when, if, and to the extent that the action will not adversely affect the rights and interests of any creditor of my estate, and in the judgment of the fiduciary it is appropriate that the beneficiary or beneficiaries have the use and enjoyment of the property, notwithstanding that it may be subjected to depreciation in value by reason of such use. The exercise of this power will not constitute a distribution of the property with respect to which it is exercised, and, whether or not exercised, neither the power nor the exercise thereof shall be deemed a constructive or actual distribution of the property to which it relates;

(5) During the fiduciary's administration of the estate and subject to all the other provisions of this instrument, to receive and receipt for all of the assets of the estate, and to have exclusive possession and control thereof;

(6) By public or private sale or sales, and for such consideration, on such terms and subject to such conditions, if any, as in the judgment of the fiduciary are for the best interests of the estate and the beneficiaries thereof, to sell, assign, transfer, convey, or exchange any real or personal property of the estate, or the estate's undivided interest in the property, or any specific part of or interest therein, including, but not limited to, standing timber, rock, gravel, sand, growing crops, oil, gas, and other minerals or mineral rights or interests, and to grant easements on real property of the estate, and to participate in the partition of real or personal property in which the estate has an undivided interest, and to accomplish any such transactions by contracts, indorsements, assignments, bills of sale, deeds, or other appropriate written instruments executed and delivered by the fiduciary in behalf of the estate, and to acknowledge the execution of the instruments in the manner provided by law for the acknowledgment of the execution of deeds when the acknowledgments are required or appropriate;



(7) For such consideration, on such terms, and subject to such conditions, if any, as in the judgment of the fiduciary are for the best interests of the estate and the beneficiaries thereof, to lease, for terms which may exceed the duration of the estate, any real or tangible personal property of the estate, or any specific parts thereof or interests therein, including, but not limited to, oil, gas, and other mineral leases, and to accomplish the leases by appropriate written instruments executed and delivered by the fiduciary in behalf of the estate, and to acknowledge the execution of the instruments in the manner provided by law for the acknowledgment of the execution of deeds when the acknowledgments are required or appropriate;

(8) In behalf of the estate, to:

(A) Borrow money;

(B) Evidence the loans by promissory notes or other evidences of indebtedness signed by the fiduciary in his or her fiduciary capacity, to be binding upon the assets of the estate but not upon the fiduciary in his or her individual capacity;

(C) Secure loans by assigning or pledging personal property of the estate, or by mortgages or deeds of trust or other appropriate instruments imposing liens upon real property or tangible personal property of the estate; and

(D) Repay the loans, including principal and interest due thereon;

(9) In behalf of the estate, to borrow money from the fiduciary in his or her individual capacity and to secure the loans in the same manner as though they were made by a third person;

(10) To enter into contracts binding upon the estate, but not upon the fiduciary in his or her individual capacity, which are reasonably incident to the administration of the estate, and which the fiduciary in the exercise of his or her best judgment believes to be for the best interests of the estate;

(11) To settle, by compromise or otherwise, claims or demands against the estate, or held in behalf of the estate;

(12) To release and satisfy of record, in whole or in part, and to enter of record credits upon, any mortgage or other lien constituting an asset of the estate;

(13) To abandon and charge off as worthless, in whole or in part, claims or demands held by or in behalf of the estate which, in the judgment of the fiduciary, are in whole or in part uncollectible;

(14) To pay taxes and excises lawfully chargeable against the assets of the estate which are in the possession or under the control of the fiduciary, including, but not limited to, ad valorem taxes upon real and personal property of the estate which became due and payable prior to the property's coming into the hands of the fiduciary, or which become due and payable while the property remains in his or her possession or under his or her control, excluding, however, income taxes payable by distributees, assessed with respect to income which has been distributed by the fiduciary pursuant to the provisions of this instrument;

(15) To repair and maintain in good condition real and tangible personal property of the estate so long as the property remains in the possession or under the control of the fiduciary;

(16) To invest liquid assets of the estate, and from time to time exchange or liquidate and reinvest the assets, pending distribution thereof, if and when such investments in the judgment of the fiduciary will not impede or delay distribution thereof pursuant to the provisions of this instrument or as otherwise by law required, and in the judgment of the fiduciary are advisable and for the best interests of the estate and the beneficiaries. In making investments the fiduciary shall be guided by the "prudent investor rule" as authorized and defined in § 28-71-105, and the investments thus authorized shall be understood to include, but not to be limited to, loans secured by mortgages, or liens otherwise imposed, upon real or personal property;

(17) Subject to the making and keeping of appropriate records with respect thereto, which will at all times clearly identify the equitable rights and interests of the estate therein, to invest funds of the estate in undivided interests in negotiable or nonnegotiable securities, or other assets, the remaining undivided interests in which are held by the fiduciary in a fiduciary capacity for the use and benefit of other beneficiaries;

(18) To retain investments which initially come into the hands of the fiduciary among the assets of the estate, without liability for loss or depreciation or diminution in value resulting from the retention, so long as in the judgment of the fiduciary it is not clearly for the best interests of the estate, and the distributees thereof, that the investments be liquidated, although the investments may not be productive of income or otherwise may not be such as the fiduciary would be authorized to make;

(19) At any time and from time to time to keep all or any portion of the estate in liquid form, uninvested, for such time as the fiduciary may deem advisable, without liability for any loss of income occasioned by so doing;

(20) To deposit funds of the trust in one (1) or more accounts carried by the fiduciary, in a clearly specified fiduciary capacity, in any one (1) or more banks and trust companies whose deposits are insured under the provisions of the Federal Deposit Insurance Act as now constituted or as the same may be hereafter amended, and if the fiduciary is itself a bank or a trust company, and is otherwise qualified, he or she may serve as the depository;

(21) To deposit for safekeeping with any bank or trust company, including the fiduciary himself or herself if he or she is a bank or trust company, any negotiable or nonnegotiable securities or other documents constituting assets or records of the estate;

(22) To bring and prosecute or to defend actions at law or in equity for the protection of the assets or interests of the estate or for the protection or enforcement of the provisions of this instrument;

(23) To employ attorneys, accountants, or other persons whose services may be necessary or advisable, in the judgment of the fiduciary, to



advise or assist him or her in the discharge of his or her duties, or in the conduct of any business constituting an asset of the estate, or in the management, maintenance, improvement, preservation, or protection of any property of the estate, or otherwise in the exercise of any powers vested in the fiduciary;

(24) To procure and pay premiums on policies of insurance to protect the estate, or any of the assets thereof, against liability for personal injuries or property damage, or against loss or damage by reason of fire, windstorm, collision, theft, embezzlement, or other hazards against which insurance is normally carried in connection with activities or on properties such as those with respect to which the fiduciary procures insurance;

(25) To allocate items of receipts or disbursements to either corpus or income of the estate, as the fiduciary in the exercise of his or her best judgment and discretion deems to be proper, without thereby doing violence to clearly established and generally recognized principles of accounting;

(26) On behalf of the estate, to purchase or otherwise lawfully acquire real or personal property, or undivided interests therein, the ownership of which, in the judgment of the fiduciary, will be advantageous to the estate, and the beneficiary or beneficiaries thereof;

(27) To construct improvements on real property of the estate, or to remove or otherwise dispose of improvements, when the action is in the judgment of the fiduciary advisable and for the best interests of the estate;

(28) To exercise in person or by proxy, with or without a power of substitution vested in the proxy, all voting rights incident to the ownership of corporate stock or other securities constituting assets of the estate, and to exercise all other rights and privileges incident to the ownership of the securities, including, but not limited to, the right to sell, exchange, endorse, or otherwise transfer the securities, to consent to, or to oppose, reorganizations, consolidations, mergers, or other proposed corporate actions by the issuer of the securities, to exercise or decline to exercise options to purchase additional shares or units of the securities or of related securities, and to pay all assessments or other expenses necessary in the judgment of the fiduciary for the protection of the securities or of the value thereof;

(29) To employ any bank or trust company to serve as custodian of any securities constituting assets of the estate, and to cause the securities, if they are nonassessable, to be registered in the name of the custodian or of its nominee, without disclosure that they are held in a fiduciary capacity; to authorize the bank or trust company, as agent and on behalf of the fiduciary, to collect, receive, and receipt for income derived from the securities, or the proceeds of sales, assignments, or exchanges thereof made by authority and under the direction of the fiduciary, and to remit to the fiduciary the income or other proceeds derived from the securities; and to pay to the custodian reasonable and customary charges made by it for the performance of the services.

However, any such action taken by the fiduciary shall not increase, decrease, or otherwise affect his or her liability, responsibility, or accountability with respect to the securities;

(30) To register nonassessable securities constituting assets of the estate in the name of the fiduciary or of his or her nominee, without disclosure that the securities are held in a fiduciary capacity, or to hold the securities unregistered or otherwise in a form that the title thereto will pass by delivery, without; in any case, increasing, decreasing, or otherwise affecting the fiduciary's liability, responsibility, or accountability with respect to the securities;

(31) In making distribution of capital assets of the estate to distributees under the provisions of this instrument, except when otherwise required by other provisions of this instrument, to make the distribution in kind or in cash, or partially in kind and partially in cash, as the fiduciary finds to be most practicable and for the best interests of the distributees; to distribute real property to two (2) or more distributees in division, or to partition the real property for the purpose of distribution, as the fiduciary in the exercise of his or her best judgment finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution of the assets if and when there is more than one (1) distributee. The determination shall be binding upon the distributees unless clearly capricious, erroneous, and inequitable;

(32) To do any and all other things, not in violation of any other terms of this instrument, which, in the judgment of the fiduciary, are necessary or appropriate for the proper management, investment, and distribution of the assets of the estate in accordance with the provisions of this instrument, and in his or her judgment are for the best interests of the estate and its beneficiaries;

(33) To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental laws affecting such property and to respond to any actual or threatened violation of any environmental law affecting property held by the fiduciary;

(34) To take, on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

(35) To refuse to accept property in trust if the fiduciary determines that any property to be donated to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving a hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

(36) To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or



private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

(37) To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

(38) To decline to serve as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between its fiduciary capacity and its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

**History.** Acts 1961, No. 153, § 3; A.S.A. 1947, § 58-116; Acts 1993, No. 421, § 1.

**U.S. Code.** The Federal Deposit Insur-

ance Act referred to in this section is codified as 12 U.S.C. § 1811 et seq.

## CASE NOTES

### ANALYSIS

Construction.

Claims by Trustee.

Effect on Federal Taxation.

### Construction.

Where a testamentary trust provides in plain and ordinary language that only one beneficiary is named and the trust gives that beneficiary the right to dispose of the property free of the trust in her will, the words and sentences are construed in their ordinary sense in order to arrive at the true intention of the testator. *McCollum v. McCollum*, 328 Ark. 607, 946 S.W.2d 181 (1997).

### Claims by Trustee.

Warranty deed conveying property from an individual to a trust made no mention of any accrued causes of action pertaining to the property, and the creation of the

trust was insufficient to have transferred an already accrued cause of action for the wrongful removal of timber. Therefore, the trustee was precluded from recovering damages accrued prior to the date of the warranty deed. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009), rehearing denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 480 (June 25, 2009).

### Effect on Federal Taxation.

Interest on loans taken by a decedent's estate to pay an IRS deficiency assessment was deductible as an administrative expense under Internal Revenue Code § 2053(a) because, under this section, the estate executor was permitted to borrow money and repay loans, including principal and interest. *Estate of Murphy v. United States*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 94923 (W.D. Ark. Oct. 2, 2009).

## 28-69-305. Compliance with environmental law.

(a) The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein in compliance with environmental law against the income or principal of the trust or estate.

(b) A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such a law.

(c) Neither the acceptance by the fiduciary of property nor a failure by the fiduciary to inspect property shall be deemed to create any

inference as to whether or not there is or may be any liability under any environmental law with respect to that property.

**History.** Acts 1993, No. 421, § 3.

## SUBCHAPTER 4 — REVOCATION, MODIFICATION, OR TERMINATION OF TRUST

### SECTION.

28-69-401. Consent.

28-69-402. Liability of trustee.

### SECTION.

28-69-403. Revocation, etc., by other means not precluded.

**Publisher's Notes.** Acts 1989, No. 841, § 4, provided that this subchapter shall apply to all trusts now existing or hereafter created, irrespective of existing or prior litigation in which revocation, modification, or termination is or has been sought.

**Effective Dates.** Acts 1989, No. 841, § 7: Mar. 22, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that courts of competent jurisdiction need statutory au-

thority to allow for the termination, modification, or revocation of trusts in circumstances where the purposes of such trusts are not being fulfilled or are frustrated by circumstances not foreseen by the settlors. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

### 28-69-401. Consent.

(a) By written consent of the settlor and all named beneficiaries of a trust or any part thereof, regardless of any spendthrift or similar protective provisions, the trust or part thereof may be revoked, modified, or terminated upon a finding by the court having jurisdiction over the trust, or otherwise being of competent jurisdiction, that the trust's purposes, as expressed in or implied by the circumstances surrounding the trust, as a result of circumstances not foreseen to the settlor are not effectively being fulfilled or are frustrated.

(b)(1) For purposes of this section, consent to the revocation, modification, or termination may be given by the court on behalf of unnamed, legally incapacitated, unascertained, or unborn beneficiaries after a hearing in which the interests of such beneficiaries are represented by a guardian ad litem.

(2) A guardian ad litem for any such beneficiaries may rely on general family benefit accruing to the living named beneficiaries and their families as a basis for approving, or not objecting to, any such revocation, modification, or termination and, in so doing, shall be immune from liability to future claims of any unnamed, legally incapacitated, unascertained, or unborn beneficiaries.

(3) In circumstances in which objection is made by a guardian ad litem for beneficiaries who are not, by name or category, mentioned in a trust that is sought to be terminated, modified, or revoked, upon a



finding that there is general family benefit to the living named beneficiaries and their families, the court shall allow the termination, modification, or revocation sought.

(c)(1) For purposes of this section, consent may be given on behalf of the estate of a deceased settlor by the court on a finding that there is general family benefit to the living named beneficiaries and their families.

(2) A personal representative of a settlor's estate may rely on general family benefit accruing to the living named beneficiaries and their families as a basis for approving, or not objecting to, any such revocation, modification, or termination and, in so doing, shall be immune from liability to future claims of any unnamed, legally incapacitated, unascertained, or unborn beneficiaries.

**History.** Acts 1989, No. 841, § 1.

### CASE NOTES

#### **Termination.**

Where the sole beneficiary of a trust and the trustee consented to a transfer of all of the trust assets to a new trust, the original trust was properly terminated, even though court approval of the termination was not obtained pursuant to sub-

section (a) of this section because, under § 28-69-403, subsection (a) did not preclude the termination of a trust pursuant to its terms or otherwise in accordance with applicable law. *In re Schultz*, 324 B.R. 712 (Bankr. E.D. Ark. 2005).

#### **28-69-402. Liability of trustee.**

A trustee of a trust that is sought to be terminated, modified, or revoked, in whole or in part, pursuant to the terms of this subchapter, may rely on general family benefit accruing to the living named beneficiaries and their families as a basis for approving, or not objecting to, any such revocation, modification, or termination and, in so doing, shall be immune from liability to future claims of any unnamed, legally incapacitated, unascertained, or unborn beneficiaries.

**History.** Acts 1989, No. 841, § 2.

#### **28-69-403. Revocation, etc., by other means not precluded.**

Nothing in this subchapter shall prevent revocation, modification, or termination of a trust pursuant to its terms, or otherwise in accordance with applicable law.

**History.** Acts 1989, No. 841, § 3.

### CASE NOTES

#### **In General.**

Where the sole beneficiary of a trust and the trustee consented to a transfer of all of the trust assets to a new trust, the

original trust was properly terminated, even though court approval of the termination was not obtained pursuant to § 28-69-401(a) because, under this section,

§ 28-69-401(a) did not preclude the termination of a trust pursuant to its terms or otherwise in accordance with applicable

law. In re Schultz, 324 B.R. 712 (Bankr. E.D. Ark. 2005).

## SUBCHAPTER 5 — RETIREMENT PLAN — SPENDTHRIFT TRUST

### SECTION.

28-69-501. Spendthrift trust.

### 28-69-501. Spendthrift trust.

Any retirement plan which meets the requirements of section 401 or section 403 of the Internal Revenue Code of 1986, as amended, which contains a prohibition against alienation and a prohibition against attachment shall be conclusively presumed for the purposes of Arkansas law to be a spendthrift trust.

**History.** Acts 1991, No. 1021, § 1.

to in this section, are codified as 26 U.S.C.

**U.S. Code.** Sections 401 and 403 of the Internal Revenue Code of 1986, referred

§§ 401 and 403.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Survey — Business Law, 14 U. Ark. Little Rock L.J. 735.

## SUBCHAPTER 6 — UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

### SECTION.

28-69-601 — 28-69-611. [Repealed.]

### 28-69-601 — 28-69-611. [Repealed.]

**Publisher's Notes.** This subchapter was repealed by Acts 2009, No. 262, § 2. The subchapter was derived from the following sources:

28-69-601. Acts 1992 (1st Ex. Sess.), No. 70, § 1.

28-69-602. Acts 1992 (1st Ex. Sess.), No. 70, § 2; 2003, No. 1109, § 1.

28-69-603. Acts 1992 (1st Ex. Sess.), No. 70, § 3; 2003, No. 1109, § 2.

28-69-604. Acts 1992 (1st Ex. Sess.), No. 70, § 4; 2003, No. 1109, § 3.

28-69-605. Acts 1992 (1st Ex. Sess.), No. 70, § 5.

28-69-606. Acts 1992 (1st Ex. Sess.), No. 70, § 6.

28-69-607. Acts 1992 (1st Ex. Sess.), No. 70, § 7; 2003, No. 1109, § 4.

28-69-608. Acts 1992 (1st Ex. Sess.), No. 70, § 8.

28-69-609. Acts 1992 (1st Ex. Sess.), No. 70, § 9.

28-69-610. Acts 1992 (1st Ex. Sess.), No. 70, § 11.

28-69-611. Acts 1992 (1st Ex. Sess.), No. 70, § 12.

## SUBCHAPTER 7 — TRUSTEE DIVISION OF TRUSTS ACT

### SECTION.

28-69-701. Short title.

28-69-702. Definitions.

28-69-703. Authority to divide trusts.

### SECTION.

28-69-704. Exercise of authority by trustee.

28-69-705. Effect of exercise of authority.



## SECTION.

28-69-706. Applicability.

**28-69-701. Short title.**

This subchapter may be cited as the "Trustee Division of Trusts Act".

**History.** Acts 1997, No. 585, § 1.

**RESEARCH REFERENCES**

**U. Ark. Little Rock L. Rev.** The Arkansas Trust Code: Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.

**28-69-702. Definitions.**

As used in this subchapter:

(1) "Trust" means any express trust, with additions thereto, wherever and however created, or any separate share of a trust and includes any arrangement other than an estate which, although not a trust, has substantially the same effect as a trust; and

(2) "Trustee" means an original, additional, or successor trustee of an inter vivos or testamentary trust, whether or not appointed or confirmed by a court, and, in the case of an arrangement which is not an estate or a trust but which has substantially the same effect as a trust, the person in actual or constructive possession of the property subject to the arrangement.

**History.** Acts 1997, No. 585, § 1.

**28-69-703. Authority to divide trusts.**

Unless expressly prohibited by the terms of the governing instrument, when property is held or to be held in a trust, the trustee is authorized, but not required, to divide the trust into two (2) or more separate trusts of equal or unequal value if the trustee determines that division of the trust is in the best interests of the beneficiaries or could result in a significant decrease in current or future federal income, gift, estate, or generation-skipping transfer taxes, or any other tax.

**History.** Acts 1997, No. 585, § 1.

**28-69-704. Exercise of authority by trustee.**

(a) A trustee may exercise the authority granted in this subchapter without procuring any judicial authorization or approval.

(b) A trustee may exercise the authority granted in this subchapter to divide both funded and unfunded trusts, provided, however, that:

(1) An unfunded testamentary trust may be divided only after the will establishing the trust has been admitted to probate; and

(2) An unfunded nontestamentary trust may be divided only if the governing instrument establishing the trust is not revocable.

**History.** Acts 1997, No. 585, § 1.

### **28-69-705. Effect of exercise of authority.**

If a trustee divides a trust into separate trusts under this subchapter, the terms of the separate trusts need not be identical but must provide for the same succession of interests and beneficiaries as are provided in the original trust. Differing tax elections may be made for each of the separate trusts.

**History.** Acts 1997, No. 585, § 1.

### **28-69-706. Applicability.**

This subchapter applies to all trustees regardless of whether the trust was created before, on, or after the date of enactment.

**History.** Acts 1997, No. 585, § 1.

**Publisher's Notes.** As to the "date of enactment," referred to in this section, the

date of the passage of Senate Bill 499, Acts 1997, No. 585, was March 17, 1997, and its effective date was August 1, 1997.

## **SUBCHAPTER 8 — UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006)**

#### **SECTION.**

- 28-69-801. Short title.
- 28-69-802. Definitions.
- 28-69-803. Standard of conduct in managing and investing institutional fund.
- 28-69-804. Appropriation for expenditure or accumulation of endowment fund — Rules of construction.
- 28-69-805. Delegation of management and investment functions.
- 28-69-806. Release or modification of restrictions on management, investment, or purpose.

#### **SECTION.**

- 28-69-807. Reviewing compliance.
- 28-69-808. Application to existing institutional funds.
- 28-69-809. Relation to Electronic Signatures in Global and National Commerce Act.
- 28-69-810. Uniformity of application and construction.
- 28-69-811, 28-69-812. [Reserved.]

### **28-69-801. Short title.**

This subchapter may be cited as the Uniform Prudent Management of Institutional Funds Act (2006).

**History.** Acts 2009, No. 262, § 1.



**28-69-802. Definitions.**

In this subchapter:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**History.** Acts 2009, No. 262, § 1.

**28-69-803. Standard of conduct in managing and investing institutional fund.**

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall

consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this subchapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this subchapter, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and



distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this subchapter.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

**History.** Acts 2009, No. 262, § 1.

#### **28-69-804. Appropriation for expenditure or accumulation of endowment fund — Rules of construction.**

(a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected total return from income and the appreciation of investments;
- (6) other resources of the institution; and
- (7) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

**History.** Acts 2009, No. 262, § 1.

**28-69-805. Delegation of management and investment functions.**

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this subchapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this subchapter.

**History.** Acts 2009, No. 262, § 1.

**28-69-806. Release or modification of restrictions on management, investment, or purpose.**

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.



(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(1) the institutional fund subject to the restriction has a total value of less than \$25,000;

(2) more than 20 years have elapsed since the fund was established; and

(3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

**History.** Acts 2009, No. 262, § 1.

### **28-69-807. Reviewing compliance.**

Compliance with this subchapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

**History.** Acts 2009, No. 262, § 1.

### **28-69-808. Application to existing institutional funds.**

This subchapter applies to institutional funds existing on or established after the effective date of this subchapter. As applied to institutional funds existing on the effective date of this subchapter this subchapter governs only decisions made or actions taken on or after that date.

**History.** Acts 2009, No. 262, § 1.

### **28-69-809. Relation to Electronic Signatures in Global and National Commerce Act.**

This subchapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

**History.** Acts 2009, No. 262, § 1.

## 28-69-810. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History.** Acts 2009, No. 262, § 1.

**Meaning of “this act”.** Acts 2009, No. 262, codified as § 28-69-801 et seq.

## 28-69-811, 28-69-812. [Reserved.]

**A.C.R.C. Notes.** Section 11 of the Uniform Prudent Management of Institutional Funds Act, an effective date provision, was not adopted in Arkansas.

Section 12 of the Uniform Prudent Management of Institutional Funds Act, a repealing provision, was not adopted in Arkansas.

# CHAPTER 70

## UNIFORM PRINCIPAL AND INCOME ACT

### SUBCHAPTER.

1. DEFINITIONS AND FIDUCIARY DUTIES.
2. DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST.
3. APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST.
4. ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST.
5. ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST.
6. MISCELLANEOUS PROVISIONS.

**Publisher's Notes.** Former Chapter 70 was repealed by Acts 1999, No. 647, § 603, effective January 1, 2000. The chapter was derived from the following sources:

- 28-70-101. Acts 1971, No. 318, § 1; A.S.A. 1947, § 58-601.
- 28-70-102. Acts 1971, No. 318, § 2; A.S.A. 1947, § 58-602.
- 28-70-103. Acts 1971, No. 318, § 3; A.S.A. 1947, § 58-603.
- 28-70-104. Acts 1971, No. 318, § 4; A.S.A. 1947, § 58-604.
- 28-70-105. Acts 1971, No. 318, § 5; A.S.A. 1947, § 58-605.
- 28-70-106. Acts 1971, No. 318, § 6; A.S.A. 1947, § 58-606.
- 28-70-107. Acts 1971, No. 318, § 7; A.S.A. 1947, § 58-607; Acts 1993, No. 236, § 1.
- 28-70-108. Acts 1971, No. 318, § 8; A.S.A. 1947, § 58-608.
- 28-70-109. Acts 1971, No. 318, § 9; A.S.A. 1947, § 58-609.

28-70-110. Acts 1971, No. 318, § 10; A.S.A. 1947, § 58-610.

28-70-111. Acts 1971, No. 318, § 11; A.S.A. 1947, § 58-611.

28-70-112. Acts 1971, No. 318, § 12; A.S.A. 1947, § 58-612.

28-70-113. Acts 1971, No. 318, § 13; A.S.A. 1947, § 58-613.

28-70-114. Acts 1971, No. 318, § 14; A.S.A. 1947, § 58-614.

28-70-115. Acts 1971, No. 318, § 15; A.S.A. 1947, § 58-615.

28-70-116. Acts 1971, No. 318, § 16; A.S.A. 1947, § 58-616.

28-70-117. Acts 1971, No. 318, § 17; A.S.A. 1947, § 58-616n.

28-70-118. Acts 1971, No. 318, § 18; A.S.A. 1947, § 58-616n.

Revised Uniform Principal and Income Act (U.L.A.) § 19, which was not adopted in Arkansas, was an effective date provision.

For Comments regarding the Uniform



Principal and Income Act, see Commentaries Volume B.

As to the effective date of this chapter, see § 28-70-604.

RESEARCH REFERENCES

ALR. Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust. 6 A.L.R.4th 786.

Propriety of sale of trust assets without consent despite trust provision requiring consent. 39 A.L.R.4th 158.

SUBCHAPTER 1 — DEFINITIONS AND FIDUCIARY DUTIES

SECTION.  
28-70-101. Short title.  
28-70-102. Definitions.  
28-70-103. Fiduciary duties — General principles.

SECTION.  
28-70-104. Trustee’s power to adjust.

28-70-101. Short title.

This chapter may be cited as the “Uniform Principal and Income Act.”

**History.** Acts 1999, No. 647, § 101.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

U. Ark. Little Rock L. Rev. The Arkansas Trust Code: Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.

Well, Now, Ain’t That Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law, 29 U. Ark. Little Rock L. Rev. 211.

28-70-102. Definitions.

In this chapter:

(1) “Accounting period” means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) “Beneficiary” includes, in the case of a decedent’s estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) “Fiduciary” means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) “Income” means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in § 28-70-401 et seq.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

**History.** Acts 1999, No. 647, § 102.

#### CASE NOTES

**Cited:** Peek v. Simmons First Nat'l Bank, 309 Ark. 294, 832 S.W.2d 458 (1992).

### 28-70-103. Fiduciary duties — General principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of § 28-70-201 et seq. and § 28-70-301 et seq., a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and



(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under § 28-70-104(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

**History.** Acts 1999, No. 647, § 103.

### **28-70-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in § 28-70-103(a), that the trustee is unable to comply with § 28-70-103(b).

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) the nature, purpose, and expected duration of the trust;
- (2) the intent of the settlor;
- (3) the identity and circumstances of the beneficiaries;
- (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (6) the net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust; or

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).



**History.** Acts 1999, No. 647, § 104;  
2005, No. 1962, § 118.

## **SUBCHAPTER 2 — DECEDENT’S ESTATE OR TERMINATING INCOME INTEREST**

### **SECTION.**

28-70-201. Determination and distribution of net income.

### **SECTION.**

28-70-202. Distribution to residuary and remainder beneficiaries.

### **28-70-201. Determination and distribution of net income.**

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in § 28-70-301 et seq., § 28-70-401 et seq., and § 28-70-501 et seq. which apply to trustees and the rules in paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent’s estate or a terminating income interest under the rules in § 28-70-301 et seq., § 28-70-401 et seq., and § 28-70-501 et seq. which apply to trustees and by:

(A) including in net income all income from property used to discharge liabilities;

(B) paying from income or principal, in the fiduciary’s discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent’s estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under paragraph (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the

beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by paragraph (3) in the manner described in § 28-70-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in § 28-70-501 or § 28-70-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

**History.** Acts 1999, No. 647, § 201.

## **28-70-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in § 28-70-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of



those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A trustee may apply the rules in this section, to the extent that the trustee considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

**History.** Acts 1999, No. 647, § 202.

SUBCHAPTER 3 — APPORTIONMENT AT BEGINNING AND END OF INCOME

INTEREST

SECTION.	SECTION.
28-70-301. When right to income begins and ends.	28-70-303. Apportionment when income interest ends.
28-70-302. Apportionment of receipts and disbursements when dece-	

**28-70-301. When right to income begins and ends.**

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) on the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor’s life;

(2) on the date of a testator’s death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator’s estate; or

(3) on the date of an individual’s death in the case of an asset that is transferred to a fiduciary by a third party because of the individual’s death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

**History.** Acts 1999, No. 647, § 301.

### CASE NOTES

#### **Relationship to Bankruptcy Laws.**

Distributions of net income from a trust were contingent on the trust producing income, but contingent interests of a debtor at the time of his bankruptcy filing were property of the bankruptcy estate; under federal and Arkansas law, debtor's

interest in the net income from the trust would be property of her bankruptcy estate under 11 U.S.C.S. § 541(a)(1) unless an exception applied. *Wetzel v. Regions Bank*, — F.3d —, 2011 U.S. App. LEXIS 16629 (8th Cir. Aug. 12, 2011).

#### **28-70-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.**

(a) A trustee shall allocate an income receipt or disbursement other than one to which § 28-70-201(1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal, and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which § 28-70-401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

**History.** Acts 1999, No. 647, § 302.

#### **28-70-303. Apportionment when income interest ends.**

(a) In this section, “undistributed income” means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that



is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than 5 percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee’s obligation to pay a fixed annuity or a fixed fraction of the value of the trust’s assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

**History.** Acts 1999, No. 647, § 303.

**SUBCHAPTER 4 — ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST**

SECTION.

- Part 1. Receipts From Entities
- 28-70-401. Character of receipts.
  - 28-70-402. Distribution from trust or estate.
  - 28-70-403. Business and other activities conducted by trustee
- Part 2. Receipts Not Normally Apportioned
- 28-70-404. Principal receipts.
  - 28-70-405. Rental property.
  - 28-70-406. Obligation to pay money.
  - 28-70-407. Insurance policies and similar contracts

SECTION.

- Part 3. Receipts Normally Apportioned
- 28-70-408. Insubstantial allocations not required.
  - 28-70-409. Deferred compensation, annuities, and similar payments.
  - 28-70-410. Liquidating asset.
  - 28-70-411. Minerals, water, and other natural resources.
  - 28-70-412. Timber.
  - 28-70-413. Property not productive of income.
  - 28-70-414. Derivatives and options.
  - 28-70-415. Asset-backed securities

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**PART 1 — RECEIPTS FROM ENTITIES**

**28-70-401. Character of receipts.**

(a) In this section, “entity” means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which § 28-70-402 applies, a business or activity to which § 28-70-403 applies, or an asset-backed security to which § 28-70-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

- (1) property other than money;
- (2) money received in one distribution or a series of related distributions in exchange for part or all of a trust’s interest in the entity;
- (3) money received in total or partial liquidation of the entity; and

(4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) if the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

**History.** Acts 1999, No. 647, § 401.

## **28-70-402. Distribution from trust or estate.**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, § 28-70-401 or § 28-70-415 applies to a receipt from the trust.

**History.** Acts 1999, No. 647, § 402.

## **28-70-403. Business and other activities conducted by trustee.**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting



records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

- (1) retail, manufacturing, service, and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) management of rental properties;
- (5) extraction of minerals and other natural resources;
- (6) timber operations; and
- (7) activities to which § 28-70-414 applies.

**History.** Acts 1999, No. 647, § 403.

## **PART 2 — RECEIPTS NOT NORMALLY APPORTIONED**

### **28-70-404. Principal receipts.**

A trustee shall allocate to principal:

(1) to the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this subchapter;

(3) amounts recovered from third parties to reimburse the trust because of disbursements described in § 28-70-502(a)(7) or for other reasons to the extent not based on the loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in Part 3.

**History.** Acts 1999, No. 647, § 404.

### **28-70-405. Rental property.**

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be

applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

**History.** Acts 1999, No. 647, § 405.

### **28-70-406. Obligation to pay money.**

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which § 28-70-409, § 28-70-410, § 28-70-411, § 28-70-412, § 28-70-414, or § 28-70-415 applies.

**History.** Acts 1999, No. 647, § 406.

### **28-70-407. Insurance policies and similar contracts.**

(a) Except as otherwise provided in subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to § 28-70-403, loss of profits from a business.

(c) This section does not apply to a contract to which § 28-70-409 applies.

**History.** Acts 1999, No. 647, § 407.



**PART 3 — RECEIPTS NORMALLY APPORTIONED****28-70-408. Insubstantial allocations not required.**

If a trustee determines that an allocation between principal and income required by § 28-70-409, § 28-70-410, § 28-70-411, § 28-70-412, or § 28-70-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in § 28-70-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in § 28-70-104(d) and may be released for the reasons and in the manner described in § 28-70-104(e). An allocation is presumed to be insubstantial if:

(1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

(2) the value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

**History.** Acts 1999, No. 647, § 408.

**28-70-409. Deferred compensation, annuities, and similar payments.**

(a) In this section:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of subsections (d), (e), (f), and (g) the term also includes a payment from any separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of

this subsection, a payment is not “required to be made” to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and subsections (b) and (c) do not apply, in determining the allocation of a payment made from a separate fund to:

(1) a trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the Internal Revenue Code of 1986, 26 U.S.C. § 2056(b)(7), as in effect January 1, 2011, has been made; or

(2) a trust that qualifies for the marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1986, 26 U.S.C. § 2056(b)(5), as in effect January 1, 2011.

(e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments would, without the application of subsection (d), qualify for the marital deduction under Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, 26 U.S.C. § 2056(b)(7)(C), as in effect January 1, 2011.

(f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal three percent of the fund’s value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund’s value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Internal Revenue Code of 1986, 26 U.S.C. § 7520, as in effect January 1, 2011, for the month preceding the accounting period for which the computation is made.

(h) This section does not apply to a payment to which § 28-70-410 applies.

**History.** Acts 1999, No. 647, § 409; 2011, No. 132, § 1.

**Amendments.** The 2011 amendment subdivided part of former (a) as (a)(1) and (2); added the last sentence in (a)(1);

added “‘Separate fund’ includes” at the beginning of (a)(2); substituted “allocate the payment” for “allocate it” in (b); rewrote (d); added present (e) through (g); and redesignated former (e) as (h).



**28-70-410. Liquidating asset.**

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to § 28-70-409, resources subject to § 28-70-411, timber subject to § 28-70-412, an activity subject to § 28-70-414, an asset subject to § 28-70-415, or any asset for which the trustee establishes a reserve for depreciation under § 28-70-503.

(b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

**History.** Acts 1999, No. 647, § 410.

**28-70-411. Minerals, water, and other natural resources.**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent must be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3), 90 percent of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, 90 percent of the amount must be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2000, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2000, the trustee shall allocate receipts from the interest as provided in this chapter.

**History.** Acts 1999, No. 647, § 411.

### **28-70-412. Timber.**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) to income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) to principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) to or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2); or

(4) to principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2000, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before January 1, 2000. If the trust acquires an interest in timberland after January 1, 2000, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter.

**History.** Acts 1999, No. 647, § 412.

### **28-70-413. Property not productive of income.**

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the surviving spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under § 28-70-104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by § 28-70-104(a). The trustee may decide which action or combination of actions to take.



(b) In cases not governed by subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

**History.** Acts 1999, No. 647, § 413.

#### **28-70-414. Derivatives and options.**

(a) In this section, “derivative” means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee accounts for transactions in derivatives pursuant to this section, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

**History.** Acts 1999, No. 647, § 414.

#### **28-70-415. Asset-backed securities.**

(a) In this section, “asset-backed security” means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which § 28-70-401 or § 28-70-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust’s entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a

payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal.

**History.** Acts 1999, No. 647, § 415.

## **SUBCHAPTER 5 — ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST**

### **SECTION.**

- 28-70-501. Disbursements from income.  
28-70-502. Disbursements from principal.  
28-70-503. Transfers from income to principal for depreciation.  
28-70-504. Transfers from income to reimburse principal.

### **SECTION.**

- 28-70-505. Income taxes.  
28-70-506. Adjustments between principal and income because of taxes.

### **28-70-501. Disbursements from income.**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which § 28-70-201(2)(B) or (C) applies:

(1) one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

**History.** Acts 1999, No. 647, § 501.

### **28-70-502. Disbursements from principal.**

(a) A trustee shall make the following disbursements from principal:

(1) the remaining one-half of the disbursements described in § 28-70-501(1) and (2);

(2) all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) payments on the principal of a trust debt;

(4) expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;



(5) premiums paid on a policy of insurance not described in § 28-70-501(4) of which the trust is the owner and beneficiary;

(6) estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

**History.** Acts 1999, No. 647, § 502.

### **28-70-503. Transfers from income to principal for depreciation.**

(a) In this section, “depreciation” means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent’s estate; or

(3) under this section if the trustee is accounting under § 28-70-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

**History.** Acts 1999, No. 647, § 503.

### **28-70-504. Transfers from income to reimburse principal.**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) disbursements described in § 28-70-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a).

**History.** Acts 1999, No. 647, § 504.

### **28-70-505. Income taxes.**

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) from income to the extent that receipts from the entity are allocated only to income;

(2) from principal to the extent that receipts from the entity are allocated only to principal;

(3) proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) from principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c), the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

**History.** Acts 1999, No. 647, § 505; 2011, No. 132, § 2.

**Amendments.** The 2011 amendment deleted "proportionately" from the end of

the introductory language of (c); inserted "only" in (c)(1) and (2); deleted (c)(2)(B); added (c)(3) and (4); and rewrote (d).



**28-70-506. Adjustments between principal and income because of taxes.**

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions, other than those described in subsection (b), that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

**History.** Acts 1999, No. 647, § 506.

**SUBCHAPTER 6 — MISCELLANEOUS PROVISIONS****SECTION.**

28-70-601. Uniformity of application and construction.

28-70-602. Severability clause.

28-70-603. [Reserved.]

**SECTION.**

28-70-604. Effective date.

28-70-605. Application of chapter to existing trusts and estates.

28-70-606. Transitional matters.

**28-70-601. Uniformity of application and construction.**

In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**History.** Acts 1999, No. 647, § 601.

**Meaning of “this act”.** Acts 1999, No.

647, codified as §§ 28-70-101 — 28-70-

605.

### 28-70-602. Severability clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

**History.** Acts 1999, No. 647, § 602.

### 28-70-603. [Reserved.]

**Publisher's Notes.** Acts 1999, No. 647, § 603, repealed former §§ 28-70-101 — 28-70-118, concerning the Revised Uniform Principal and Income Act. For present comparable provisions, see §§ 28-70-101 — 28-70-605.

### 28-70-604. Effective date.

This chapter takes effect on January 1, 2000.

**History.** Acts 1999, No. 647, § 604.

### 28-70-605. Application of chapter to existing trusts and estates.

This chapter applies to every trust or decedent's estate existing on January 1, 2000, except as otherwise expressly provided in the will or terms of the trust or in this chapter.

**History.** Acts 1999, No. 647, § 605.

### 28-70-606. Transitional matters.

Section 28-70-409, as amended by this act, applies to a trust described in § 28-70-409(d) on and after the following dates:

- (1) If the trust is not funded as of July 27, 2011, the date of the decedent's death.
- (2) If the trust is initially funded in the calendar year beginning January 1, 2011, the date of the decedent's death.
- (3) If the trust is not described in paragraph (1) or (2), January 1, 2012.

**History.** Acts 2011, No. 132, § 3. 132, codified as §§ 28-70-409, 28-70-505, and 28-70-606.  
**Meaning of "this act".** Acts 2011, No.

## CHAPTER 71

### INVESTMENT OF TRUST FUNDS

#### SECTION.

- 28-71-101. Fiduciaries' powers cumulative — Uniform Veterans' Guardianship Act not affected.
- 28-71-102. Power of court not limited by chapter.

#### SECTION.

- 28-71-103. Fiduciaries subject to chapter.
- 28-71-104. Additional authority to invest funds.
- 28-71-105. Standard of judgment and care — Prudent investor rule.



## SECTION.

28-71-106. Investments authorized.

28-71-107. Limited investment in private

venture capital projects  
authorized.

**Effective Dates.** Acts 1985, No. 905, § 5: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that financial institutions and fiduciaries should be allowed to invest a small portion of their assets in Arkansas private venture capital projects and thereby contribute to the economic health of this State; that as soon as this Act goes into effect that more funds

will be available for Arkansas private venture capital projects and that this Act should therefore be given immediate effect. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

## RESEARCH REFERENCES

**Am. Jur.** 31 Am. Jur. 2d, Exec. & Ad., § 228 et seq.

39 Am. Jur. 2d, Guar. & W., § 145 et seq.

76 Am. Jur. 2d, Trusts, § 476 et seq.

**Ark. L. Rev.** Prudent Man Rule Appli-

cable to Investments by Fiduciaries, 9 Ark. L. Rev. 407.

**C.J.S.** 34 C.J.S., Exec. & Ad., § 223 et seq.

39 C.J.S., Guar. & W., § 115 et seq.

90A C.J.S., Trusts, § 482 et seq.

## 28-71-101. Fiduciaries' powers cumulative — Uniform Veterans' Guardianship Act not affected.

(a) The powers granted by this chapter to the fiduciaries named in this chapter shall be in addition to the powers existing by virtue of other acts heretofore enacted authorizing investments by fiduciaries.

(b) This chapter shall not apply in any situation governed by the Uniform Veterans' Guardianship Act, § 28-66-101 et seq.

**History.** Acts 1955, No. 121, § 6; A.S.A. 1947, § 58-306.

## RESEARCH REFERENCES

**U. Ark. Little Rock L. Rev.** The Arkansas Trust Code: Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.

## 28-71-102. Power of court not limited by chapter.

Nothing contained in this chapter shall be construed to limit the power of a court of competent jurisdiction to permit a fiduciary to take any action, or to restrain a fiduciary from taking any action, notwithstanding the permissions or restrictions contained in any written instrument under which the fiduciary is acting.

**History.** Acts 1955, No. 121, § 4; A.S.A. 1947, § 58-304.

### **28-71-103. Fiduciaries subject to chapter.**

Fiduciaries acting under authority granted before or after June 9, 1955, shall be subject to the provisions of this chapter.

**History.** Acts 1955, No. 121, § 5; A.S.A. 1947, § 58-305.

### **28-71-104. Additional authority to invest funds.**

(a) Unless prohibited by will, deed, trust, court order, or other instrument establishing the fiduciary relationship or unless another mode of investment is prescribed by any such instrument, trustees, guardians, and personal representatives, in addition to methods of investment now authorized by law, may invest all funds held in trust or for investment as provided in this chapter.

(b) In addition to other investments authorized by law for the investment of funds held by a fiduciary, or by the instrument governing the fiduciary relationship, and notwithstanding any other provision of law, a bank or trust company acting as a fiduciary, agent, or otherwise may, in the exercise of its investment discretion or at the direction of another person authorized to direct investment of funds held by a bank or trust company as fiduciary, invest and reinvest in the securities of an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq., as amended, so long as the portfolio of the investment company or investment trust consists substantially of investments not prohibited by the governing instrument.

(c) The fact that such a bank or trust company or an affiliate of the bank or trust company provides services to the investment company or investment trust such as that of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and is receiving reasonable compensation for those services shall not preclude the bank or trust company from investing or reinvesting in the securities of the open-end or closed-end management investment trust registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq., as amended.

**History.** Acts 1955, No. 121, § 1; A.S.A. 1947, § 58-301; Acts 1993, No. 482, § 1. loan authority bonds, legal and authorized investments, § 6-81-120.

**Cross References.** Arkansas student

### **28-71-105. Standard of judgment and care — Prudent investor rule.**

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property held in a fiduciary capacity, other than trusts subject to the prudent investor rule as set forth in the Arkansas Trust



Code, § 28-73-101 et seq., the fiduciary shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

**History.** Acts 1955, No. 121, § 2; A.S.A. 1947, § 58-302; Acts 1997, No. 940, § 114; 2005, No. 1031, § 3.

### RESEARCH REFERENCES

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

**U. Ark. Little Rock L.J.** Legislative Survey, Banking Law, 8 U. Ark. Little Rock L.J. 547.

### CASE NOTES

#### **Trust Agreements.**

The trustee of 3,100 acres of farmland under an agreement that provided: "The trustee shall obtain a tenant or lessee for all farm lands owned by the trust" did not violate this mandate by placing the cotton allotment of lands belonging to the trust in the cropland adjustment program for

10 years where there was evidence that men of prudence, intelligence, and discretion, in the management of their own affairs, were signing up their cotton crop allotments in the cropland adjustment program for a period of 10 years. *McClure v. McClure*, 243 Ark. 421, 420 S.W.2d 98 (1967).

### **28-71-106. Investments authorized.**

(a) Within the limitations of the standard set forth in § 28-71-105, a fiduciary is authorized to acquire and retain every kind of real, personal, or mixed property and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, preferred or common stocks, shares or interests in common trust funds, and securities of any open-end or closed-end management-type investment company or investment trust registered under the Federal Investment Company Act of 1940, as amended, which persons of prudence, discretion, and intelligence acquire or retain for their own account.

(b)(1) Whenever a fiduciary is authorized or required by the instrument, judgment, decree, or order establishing the fiduciary relationship to invest funds in specifically described securities, the fiduciary may, unless expressly prohibited by such an instrument, judgment, decree, or order, invest such funds in any investment company or investment trust described in subsection (a) of this section, the portfolio of which is limited to such specifically described securities and to repurchase agreements fully collateralized by such specifically described securities, provided that the investment company or investment trust takes delivery of the collateral either directly or through an authorized custodian.

(2) Notwithstanding any other provision of state law, this subsection shall apply to all funds deposited with or controlled by any bank trustee acting in a fiduciary capacity in connection with the issuance, sale or redemption of bonds, notes, and other certificates of indebtedness.

(c) Unless expressly prohibited by the instrument, judgment, decree, or order establishing the fiduciary relationship, a fiduciary may invest funds in certificates of deposit and savings accounts of any state bank or national bank whose deposits are insured by the Federal Deposit Insurance Corporation and whose main office is in this state, including itself, if the fiduciary is a bank.

(d) Whenever the express terms or limitations set forth in any instrument use the terms "legal investment" or "authorized investment" or words of similar import, the words shall be taken to mean any investment authorized or permitted by this section.

(e) Consistent with the trustee's investment powers, a trustee may make temporary investments of funds in short-term interest-bearing obligations or deposits, or other short-term liquid investments. Trustees are authorized to charge reasonable fees for this service in addition to other compensation to which the trustee is entitled.

**History.** Acts 1955, No. 121, §§ 2, 3; 1977, No. 949, § 1; A.S.A. 1947, §§ 58-302, 58-303, 58-307; Acts 1989, No. 658, § 3; 1991, No. 668, § 2; 1993, No. 1025, § 1.

**U.S. Code.** The Federal Investment Company Act of 1940, referred to in this section, is codified as 15 U.S.C. § 80a-1 et seq.

## RESEARCH REFERENCES

**U. Ark. Little Rock L.J.** Legislative Survey, Banking Law, 8 U. Ark. Little Rock L.J. 547.

### **28-71-107. Limited investment in private venture capital projects authorized.**

(a) Unless prohibited by federal law or regulations promulgated thereunder, but notwithstanding any law or regulation of this state to the contrary, fiduciaries and financial institutions may invest up to no more than two and one-half percent (2½%) of their funds eligible for investment, but not more than ten percent (10%) of their capital, including common capital stock, certified surplus, capital notes, and undivided profits, in Arkansas private venture capital projects without being in contravention of any prudent investor rule. This limitation is applicable only at the time of investment, and it shall not constitute a contravention of the prudent investor rule if investments in Arkansas private venture capital projects are in excess of this limitation by virtue of a reduction in the amount of funds eligible for investment.

(b) The primary state regulators of the fiduciaries making such investments under this section shall promulgate rules and regulations for the implementation of this section.



(c)(1) The prudent investor rule is embodied in several laws of this state pertaining to the investment of funds by financial institutions and fiduciaries, and the General Assembly has determined that the people of this state would benefit by the limited relaxation of the prudent investor rule to the extent that fiduciaries and financial institutions should be allowed to invest a small portion of their assets in private venture capital projects within this state.

(2) It is the intent of this section to allow fiduciaries and financial institutions to invest up to two and one-half percent (2½%) of their funds eligible for investment, but not more than ten percent (10%) of their capital, including common capital stock, certified surplus, capital notes, and undivided profits, in Arkansas private venture capital projects without incurring liability for violation of the prudent investor rule.

**History.** Acts 1985, No. 905, §§ 1-3;  
A.S.A. 1947, §§ 58-308 — 58-310.

## RESEARCH REFERENCES

**Ark. L. Rev.** Haught, 1988 Update to the Arkansas Probate System: An Overview of Recent Developments in Arkansas Probate Practice, 42 Ark. L. Rev. 631.

**U. Ark. Little Rock L.J.** Legislative Survey, Banking Law, 8 U. Ark. Little Rock L.J. 547.

# CHAPTER 72

## PARTICULAR TRUSTS

### SUBCHAPTER.

1. MISSING PERSONS.
2. PUBLIC TRUSTS.
3. CHARITABLE TRUSTS.
4. ARKANSAS CUSTODIAL TRUST ACT.
5. LONG-TERM INTERGENERATIONAL SECURITY ACT OF 1995.

### SUBCHAPTER 1 — MISSING PERSONS

#### SECTION.

- 28-72-101. Jurisdiction of circuit courts.  
28-72-102. Appointment of trustee.

#### SECTION.

- 28-72-103. Powers and duties of trustee.  
28-72-104. Bond of trustee.

**Effective Dates.** Acts 1943, No. 71, § 4: approved Feb. 19, 1943. Emergency clause provided: "That since many persons have been captured by our enemies during this war and many persons are missing and their whereabouts are unknown, leaving indebtedness due them from contractors and other persons, and

leaving dependents in this state who are in need and want, and many debtors are anxious to pay the amounts they owe such missing persons and persons imprisoned in any foreign country, an emergency is declared to exist, and it being necessary for the preservation of the public peace, health and safety that this act go into

immediate operation, this act shall be in force and effect from and after its passage."

### 28-72-101. Jurisdiction of circuit courts.

The circuit courts of this state shall have jurisdiction of the estates of persons imprisoned in a foreign country and of the estates of missing persons.

**History.** Acts 1943, No. 71, § 1; A.S.A. 1947, § 58-201.

### 28-72-102. Appointment of trustee.

(a) It shall be the duty of the circuit courts to appoint some suitable person trustee of the estate of any person imprisoned in some foreign country or who may be missing and whose whereabouts are unknown, and who has a family or dependents residing in this state.

(b) The trustee shall be appointed upon the petition of any person dependent upon the services of the missing person, or person imprisoned in a foreign country, for his or her support.

**History.** Acts 1943, No. 71, §§ 1, 2; A.S.A. 1947, §§ 58-201, 58-202.

**Cross References.** Presumption of death after 5 years' absence, § 16-40-105.

## CASE NOTES

#### Missing Attorney.

The Supreme Court declined to adopt a proposal granting a probate judge jurisdiction to appoint a trustee for a lawyer who is disabled, deceased, or has disappeared, since this proposal would clearly conflict with the statutory scheme for establishing a guardianship for an incompetent attorney as well as the statutory

scheme for decedent's estates, under chapter 65 of this title, and since there are express statutes, under this section and §§ 28-72-103 and 28-72-104, which conflict with the proposal for attorneys who have disappeared. In re Committee on Professional Ethics, 273 Ark. 496, 621 S.W.2d 223 (1981).

### 28-72-103. Powers and duties of trustee.

(a) Any trustee so appointed by the circuit court of this state shall have authority to collect and receive and give a receipt for all sums of money or property of any kind or character that may be due any missing person or person imprisoned in any foreign country.

(b) Upon receipt of property of any kind or anything of value, the trustee shall immediately report to the court the amount of money or other property received by him or her as trustee.

(c) The court shall have authority to authorize the trustee to use the funds or property in the amount and in the manner provided by an order of the court for the support and maintenance of the family or



dependents of the missing person or person imprisoned in any foreign country.

**History.** Acts 1943, No. 71, § 2; A.S.A. 1947, § 58-202.

### 28-72-104. Bond of trustee.

(a) The trustee shall give bond in double the amount of property or money received and, upon the appearance of the missing person or person imprisoned in any foreign country, shall be required to account to and turn over to the person the balance of all funds or property not legally expended by the trustee under the order of the circuit court.

(b) The bondsmen shall be liable for any sums or property unaccounted for by the trustee, in the same manner that bondsmen of administrators in this state are liable on their bonds.

**History.** Acts 1943, No. 71, § 3; A.S.A. 1947, § 58-203.

## SUBCHAPTER 2 — PUBLIC TRUSTS

### SECTION.

28-72-201. Public trusts authorized.

28-72-202. Acceptance of trust.

28-72-203. Trustee — Appointment and powers.

28-72-204. Lease of property to trustee.

28-72-205. Amendment or termination of trust instrument.

### SECTION.

28-72-206. Liability of trustee and the trust estate.

28-72-207. Trust estate exempt from taxation.

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**A.C.R.C. Notes.** Acts 1997, No. 1201, § 14, codified as § 12-63-103, provided: “(a) The State of Arkansas acknowledges and endorses the establishment of the Fort Chaffee Redevelopment Authority Public Trust, created by Sebastian County, Arkansas, on February 19, 1997, as set forth in the Fort Chaffee Redevelopment Authority Indenture of Trust and pursuant to the provisions of the laws of the State of Arkansas, including specifically Title 28, Chapter 72, Subchapter 2 of the Arkansas Code of 1987 Annotated.”

“(b) The Fort Chaffee Redevelopment Authority Public Trust is hereby recognized by the State as the entity to: prepare a comprehensive study of all issues related to the closure and redevelopment of Fort Chaffee Military Base surplus properties and to ensure proper planning and optimal use of the property embodied

therein; after conversion of such portions of the Base as the U.S. Department of Defense deems unnecessary to its overall military mission, to manage, own and operate those portions so as to yield the maximum benefit to the residents of affected counties and communities in the State of Arkansas; and for other purposes as enabled and set forth in the Fort Chaffee Redevelopment Authority Indenture of Trust. The State further recognizes that such activities as set forth in the Fort Chaffee Redevelopment Authority Indenture of Trust are in the public interest and serve a public purpose and can best be accomplished by the creation of a public trust vested with the powers and duties specified in the Indenture of Trust.”

**Cross References.** Uniform Testamentary Additions to Trusts Act, § 28-27-101 et seq.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Sheppard, Arkansas Through Civic Donations, 2001 Ark. L. Tree Trusts: How Private Landholders May Protect Arboreal Landmarks Notes 65.

**28-72-201. Public trusts authorized.**

Express trusts may be created in real or personal property, or either or both, or any estate in either or both, with the state, or any governmental or municipal subdivision thereof, or any agency or department of either, or more than one (1) of any of the foregoing, as the beneficiary thereof, for the purpose of aiding or furthering or the providing of funds for the aiding or furthering of any one (1) or more proper functions of the beneficiary then authorized or which might lawfully be authorized. However, no funds of any beneficiary derived from other than trust sources shall be charged with or expended in the execution of the trust except by express lawful action of the beneficiary.

**History.** Acts 1961, No. 459, § 1; A.S.A. 1947, § 58-401.

**28-72-202. Acceptance of trust.**

(a) No public trust shall become effective until the beneficial interest therein shall have been accepted by a beneficiary thereof, and the trust shall be effective only as to beneficiaries who have accepted beneficial interest thereunder.

(b) If the state or any of its agencies or departments shall be named as the beneficiary, the beneficial interests shall be accepted by the Governor, and if any governmental or municipal subdivision of the state is named as the beneficiary, the beneficial interests shall be accepted by the governing body thereof. The power and authority to accept beneficial interests under such trusts is conferred upon the Governor and such governing bodies.

(c) The acceptance of beneficial interest of any trust shall be endorsed upon the trust instrument by the accepting governmental authority.

(d) Upon acceptance, the trust instrument shall be a binding contract between the state and the designated beneficiary and the trustee of the trust for the acceptance of the beneficial interest therein and for the application of the trust property and its proceeds, and the operation of the trust, in accordance with the purposes set forth in the trust instrument. The trustee of the trust thereupon shall be the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created.

**History.** Acts 1961, No. 459, §§ 2, 4; A.S.A. 1947, §§ 58-402, 58-404.



**28-72-203. Trustee — Appointment and powers.**

The instrument creating the trust may provide for the appointment, succession, powers, duties, term, and compensation of the trustee and may be for the term of the duration of any beneficiary or for a shorter term. In case of the failure of the trust instrument to make provision for any of the foregoing, or for anything necessary to the execution of the trust, the general laws of the state shall control with respect to the omission.

**History.** Acts 1961, No. 459, § 5; A.S.A. 1947, § 58-405.

**28-72-204. Lease of property to trustee.**

The officers or any other governmental or municipal authorities having the custody, management, or control of any property of any beneficiary of such a trust, at the time of, or after, creation of the trust, may lease any such property as shall be needful in the execution of the trust to the trustee or trustees to implement the performance of the trust purposes for the benefit of the beneficiary.

**History.** Acts 1961, No. 459, § 3; A.S.A. 1947, § 58-403.

**28-72-205. Amendment or termination of trust instrument.**

The instrument creating any public trust may be amended, or the trust may be terminated, by agreement of the trustee, or, if there is more than one (1) trustee, then of all of the trustees, and of the authority having the power of acceptance of beneficial interest thereunder. However, no such amendment or termination shall be effective while there exist any contractual obligations chargeable against the trust estate or its revenues unless the holder of the contractual obligations also agrees thereto.

**History.** Acts 1961, No. 459, § 7; A.S.A. 1947, § 58-407.

**28-72-206. Liability of trustee and the trust estate.**

No trustee of such a trust, or any beneficiary thereof, shall be charged with any liability whatsoever by reason of any act or omission committed or suffered in the performance of the purposes of the trust. However, liability for any act or omission so committed or suffered shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge the liability, and not otherwise.

**History.** Acts 1961, No. 459, § 6; A.S.A. 1947, § 58-406.

**28-72-207. Trust estate exempt from taxation.**

For all purposes of taxation under the authority of the state or any of its governmental or taxing subdivisions, the trust estate and its revenues shall have the same immunities as other property and revenues of the beneficiary or beneficiaries not so in trust.

**History.** Acts 1961, No. 459, § 8; A.S.A. 1947, § 58-408.

**SUBCHAPTER 3 — CHARITABLE TRUSTS**

SECTION.

28-72-301. Definition.

28-72-302. Amendment of trust instru-

ment by operation of law  
— Exclusions.

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**Effective Dates.** Acts 1971, No. 728, § 6: Apr. 28, 1971. Emergency clause provided: "The General Assembly finding that private foundations immediately and urgently need the amendments to their governing instruments contained in this

Act in order to remain exempt from federal taxation, an emergency, therefore, is hereby declared to exist, and this Act being necessary for the preservation of the public peace and welfare, shall be effective from and after its passage and approval."

**RESEARCH REFERENCES**

**ALR.** Validity, construction, and effect of provisions of charitable trust providing

for accumulation of income, 6 A.L.R.4th 903.

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**28-72-301. Definition.**

As used in this subchapter, unless the context otherwise requires, all references to "the code" are to the Internal Revenue Code of 1954, and all references to specific sections of the code include future amendments to the sections and corresponding provisions of any future federal tax laws.

**History.** Acts 1971, No. 728, § 3; A.S.A. 1947, § 58-119.

**Publisher's Notes.** Acts 1971, No. 728, § 3, is also codified as § 4-28-208(e).

**U.S. Code.** The Internal Revenue Code of 1954, referred to in this section, is codified in Title 26 of the United States Code.

**28-72-302. Amendment of trust instrument by operation of law  
— Exclusions.**

(a) Notwithstanding any provision in the laws of this state or in the governing instrument to the contrary, except as provided in subsections (c) and (d) of this section, the governing instrument of each trust which is a private foundation as defined in section 509 of the Internal Revenue Code of 1954, including each nonexempt charitable trust as defined in



section 4947(a)(1) of the code which is treated as a private foundation, and the governing instrument of each nonexempt split-interest trust as defined in section 4947(a)(2) of the code, but only to the extent that section 508(e) of the code is applicable to a nonexempt split-interest trust under section 4947(a)(2) of the code, shall be deemed to contain the following provisions: "The trust shall make distributions at such time and in such manner as not to become subject to the tax on undistributed income imposed by section 4942 of the Internal Revenue Code of 1954; the trust shall not engage in any act of self-dealing (as defined in section 4941(d) of the code) which would subject it to tax under section 4941 of the code; the trust shall not retain any excess business holdings (as defined in section 4943(c) of the code) which would subject it to tax under section 4943 of the code; the trust shall not make any investments in such manner as to incur tax liability under section 4944 of the code; and the trust shall not make any taxable expenditures (as defined in section 4945(d) of the code) which would subject it to tax under section 4945 of the code."

(b) With respect to any such trust created prior to January 1, 1970, subsection (a) of this section shall apply only for its taxable years beginning on or after January 1, 1972.

(c) The provisions of subsection (a) of this section shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that the application would be contrary to the terms of the instrument governing the trust and that the terms may not properly be changed to conform to subsection (a) of this section.

(d) The trustee of any trust described in subsection (a) of this section, with the consent of the trustor if he or she is then living and competent to give consent, without judicial proceedings, may amend the trust to expressly exclude the application of this section by executing a written amendment to the trust and filing a duplicate original of the amendment with the Attorney General, and upon filing of the amendment, subsection (a) of this section shall not apply to the trust.

(e) Nothing contained herein shall impair the rights and powers of the courts, or any officer, agency, or department of this state, with respect to the trust.

**History.** Acts 1971, No. 728, § 2; A.S.A. 1947, § 58-118.

**U.S. Code.** Sections 508(e), 509, 4941, 4941(d), 4942, 4943(c), 4944, 4945, 4947(a)(1), and 4947(a)(2) of the Internal Revenue Code of 1954, referred to in this section, are codified as 26 U.S.C.

§§ 508(e), 509, 4941, 4941(d), 4942, 4943(c), 4944, 4945, 4947(a)(1), and 4947(a)(2), respectively.

**Cross References.** Nonresident beneficiary exempt from state tax, § 26-51-201.

#### SUBCHAPTER 4 — ARKANSAS CUSTODIAL TRUST ACT

##### SECTION.

28-72-401. Definitions.

28-72-402. Custodial trust — General.

##### SECTION.

28-72-403. Custodial trustee for future payment or transfer.

## SECTION.

- 28-72-404. Form and effect of receipt and acceptance by custodial trustee — Jurisdiction.
- 28-72-405. Transfer to custodial trustee by fiduciary or obligor — Facility of payment.
- 28-72-406. Multiple beneficiaries — Separate custodial trusts — Survivorship.
- 28-72-407. General duties of custodial trustee.
- 28-72-408. General powers of custodial trustee.
- 28-72-409. Use of custodial trust property.
- 28-72-410. Determination of incapacity — Effect.
- 28-72-411. Exemption of third person from liability.
- 28-72-412. Liability to third person.
- 28-72-413. Declination, resignation, incapacity, death, or removal of

## SECTION.

- custodial trustee — Designation of successor custodial trustee.
- 28-72-414. Expenses, compensation, and bond of custodial trustee.
- 28-72-415. Reporting and accounting by custodial trustee — Determination of liability of custodial trustee.
- 28-72-416. Limitations of action against custodial trustee.
- 28-72-417. Distribution on termination.
- 28-72-418. Methods and forms for creating custodial trusts.
- 28-72-419. Applicable law.
- 28-72-420. Uniformity of application and construction.
- 28-72-421. Title.
- 28-72-422. Severability.

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### RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Business Law, 14 U. Ark. Little Rock L.J. 735.

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### 28-72-401. Definitions.

As used in this subchapter:

- (1) "Adult" means an individual who is at least eighteen (18) years of age.
- (2) "Beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under this subchapter.
- (3) "Conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions.
- (4) "Court" means the circuit court of the appropriate county of this state.
- (5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this subchapter and the income from the proceeds of that interest.
- (6) "Custodial trustee" means a person designated as trustee of a custodial trust under this subchapter or a substitute or successor to the person designated.



(7) "Guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.

(9) "Legal representative" means a personal representative or conservator.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers.

**History.** Acts 1991, No. 273, § 1.

## RESEARCH REFERENCES

**Ark. L. Rev.** Carroll, Uniform Laws in      kansas Trust Code: Good Law for Arkan-  
Arkansas, 52 Ark. L. Rev. 313.      sas. 27 U. Ark. Little Rock L. Rev. 191.  
**U. Ark. Little Rock L. Rev.** The Ar-

### 28-72-402. Custodial trust — General.

(a) A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary, an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under this subchapter.

(b) A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under this subchapter. A registration or

other declaration of trust for the sole benefit of the declarant is not a custodial trust under this subchapter.

(c) Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

(d) Except as provided in subsection (e), a transferor may not terminate a custodial trust.

(e) The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(f) Any person may augment existing custodial trust property by the addition of other property pursuant to this subchapter.

(g) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(h) This subchapter does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this subchapter may be enforceable according to its terms under other law.

**History.** Acts 1991, No. 273, § 2.

### **28-72-403. Custodial trustee for future payment or transfer.**

(a) A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by: "as custodial trustee for .... (name of beneficiary) under the Arkansas Custodial Trust Act, § 28-72-401 et seq."

(b) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

(c) A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right.

**History.** Acts 1991, No. 273, § 3.

### **28-72-404. Form and effect of receipt and acceptance by custodial trustee — Jurisdiction.**

(a) Obligations of a custodial trustee, including the obligation to follow directions of the beneficiary, arise under this subchapter upon the custodial trustee's acceptance, express or implied, of the custodial trust property.



(b) The custodial trustee’s acceptance may be evidenced by a writing stating in substance:

CUSTODIAL TRUSTEE’S RECEIPT AND ACCEPTANCE

I, ..... (name of custodial trustee), acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act. I undertake to administer and distribute the custodial trust property pursuant to the Arkansas Custodial Trust Act. My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of .....  
Dated: .....

.....  
(Signature of Custodial Trustee)

(c) Upon accepting custodial trust property, a person designated as custodial trustee under this subchapter is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust.

History. Acts 1991, No. 273, § 4.

28-72-405. Transfer to custodial trustee by fiduciary or obligor — Facility of payment.

(a) Unless otherwise directed by an instrument designating a custodial trustee pursuant to § 28-72-403, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary’s family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds twenty thousand dollars (\$20,000), the transfer is not effective unless authorized by the court.

(b) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

History. Acts 1991, No. 273, § 5.

28-72-406. Multiple beneficiaries — Separate custodial trusts — Survivorship.

(a) Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship

is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship.

(b) Custodial trust property held under this subchapter by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

(c) A custodial trustee of custodial trust property held for more than one (1) beneficiary shall separately account to each beneficiary pursuant to §§ 28-72-407 and 28-72-415 for the administration of the custodial trust.

**History.** Acts 1991, No. 273, § 6.

### **28-72-407. General duties of custodial trustee.**

(a) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(b) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor. If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.

(c) Subject to subsection (b), a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(d) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for .... (name of beneficiary) under the Arkansas Custodial Trust Act, § 28-72-401 et seq."

(e) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(f) The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.



**History.** Acts 1991, No. 273, § 7.

### **28-72-408. General powers of custodial trustee.**

(a) A custodial trustee, acting in fiduciary capacity, has all the rights and powers of custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(b) This section does not relieve a custodial trustee from liability for a violation of § 28-72-407.

**History.** Acts 1991, No. 273, § 8.

### **28-72-409. Use of custodial trust property.**

(a) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(b) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(c) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary.

**History.** Acts 1991, No. 273, § 9.

### **28-72-410. Determination of incapacity — Effect.**

(a) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if (i) the custodial trust was created under § 28-72-405, (ii) the transferor has so directed in the instrument creating the custodial trust, or (iii) the custodial trustee has determined that the beneficiary is incapacitated.

(b) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon (i) previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney, (ii) the certificate of the beneficiary's physician, or (iii) other persuasive evidence.

(c) If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

(d) On petition of the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

(e) Absent determination of incapacity of the beneficiary under subsection (b) or (d), a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of this subchapter applicable to an incapacitated beneficiary.

(f) Incapacity of a beneficiary does not terminate:

- (i) The custodial trust;
- (ii) Any designation of a successor custodial trustee;
- (iii) Rights or powers of the custodial trustee; or
- (iv) Any immunities of third persons acting on instructions of the custodial trustee.

**History.** Acts 1991, No. 273, § 10.

### **28-72-411. Exemption of third person from liability.**

A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

- (1) the validity of the purported custodial trustee's designation;
- (2) the propriety of, or the authority under this subchapter for, any action of the purported custodial trustee;
- (3) the validity or propriety of an instrument executed or instruction given pursuant to this subchapter either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or
- (4) the propriety of the application of property vested in the purported custodial trustee.

**History.** Acts 1991, No. 273, § 11.

### **28-72-412. Liability to third person.**

(a) A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property, or a tort committed in the course of administering the custodial trust, may be asserted by a third person against the custodial trust property by proceeding against the custodial



trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(b) A custodial trustee is not personally liable to a third person:

(1) on a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(2) for an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

(c) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(d) Subsections (b) and (c) do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person is protected as the insured by liability insurance.

**History.** Acts 1991, No. 273, § 12.

### **28-72-413. Declination, resignation, incapacity, death, or removal of custodial trustee — Designation of successor custodial trustee.**

(a) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under § 28-72-403 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to § 28-72-403. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

(b) A custodial trustee who has accepted the custodial trust property may resign by (i) delivering written notice to a successor custodial trustee, if any, the beneficiary, and, if the beneficiary is incapacitated, to the beneficiary's conservator, if any, and (ii) transferring or registering, or recording an appropriate instrument relating to, the custodial trust property, in the name of, and delivering the records to, the successor custodial trustee identified under subsection (c).

(c) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated under § 28-72-402(g) or § 28-72-403 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within ninety (90) days after the ineligibility, resignation, death, or incapacity of the custodial trustee, the resigning custodial trustee may designate a successor custodial trustee.

(d) If a successor custodial trustee is not designated pursuant to subsection (c), the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to designate a successor custodial trustee.

(e) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

(f) A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief.

**History.** Acts 1991, No. 273, § 13.

#### **28-72-414. Expenses, compensation, and bond of custodial trustee.**

Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

(1) is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(2) has a noncumulative election, to be made no later than six (6) months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

(3) need not furnish a bond or other security for the faithful performance of fiduciary duties.

**History.** Acts 1991, No. 273, § 14.

#### **28-72-415. Reporting and accounting by custodial trustee — Determination of liability of custodial trustee.**

(a) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property (i) once each year, (ii) upon request at reasonable times by the beneficiary or the beneficiary's legal representative, (iii) upon resignation or removal of the custodial trustee, and (iv) upon termination of the custodial trust. The statements must be provided to the beneficiary or to the beneficiary's legal



representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trust property is to be delivered.

(b) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(c) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

(d) In an action or proceeding under this subchapter or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

(e) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(f) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others.

**History.** Acts 1991, No. 273, § 15.

### **28-72-416. Limitations of action against custodial trustee.**

(a) Except as provided in subsection (c), unless previously barred by adjudication, consent, or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(1) Who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two (2) years after receipt of the final account or statement; or

(2) Who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three (3) years after the termination of the custodial trust.

(b) Except as provided in subsection (c), a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust, is barred unless an action or proceeding to assert the claim is commenced within five (5) years after the termination of the custodial trust.

(c) A claim for relief is not barred by this section if the claimant:

(1) is a minor, until the earlier of two (2) years after the claimant becomes an adult or dies;

(2) is an incapacitated adult, until the earliest of two (2) years after (i) the appointment of a conservator, (ii) the removal of the incapacity, or (iii) the death of the claimant; or

(3) was an adult, now deceased, who was not incapacitated, until two (2) years after the claimant's death.

**History.** Acts 1991, No. 273, § 16.

### **28-72-417. Distribution on termination.**

(a) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

(1) to the beneficiary, if not incapacitated or deceased;

(2) to the conservator or other recipient designated by the court for an incapacitated beneficiary; or

(3) upon the beneficiary's death, in the following order:

(i) as last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;

(ii) to the survivor of multiple beneficiaries if survivorship is provided for pursuant to § 28-72-406;

(iii) as designated in the instrument creating the custodial trust;

or

(iv) to the estate of the deceased beneficiary.

(b) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

(c) Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

**History.** Acts 1991, No. 273, § 17.

### **28-72-418. Methods and forms for creating custodial trusts.**

(a) If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of § 28-72-402 are satisfied by:

(1) The execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

#### **TRANSFER UNDER THE ARKANSAS CUSTODIAL TRUST ACT**

I, ..... (name of transferor or name and representative capacity if a fiduciary), transfer to ..... (name of trustee other than transferor), as custodial trustee for ..... (name of beneficiary) as beneficiary and ..... as distributee on termination of the trust in



absence of direction by the beneficiary under the Arkansas Custodial Trust Act, the following: ..... (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).  
Dated: .....

.....  
(Signature)  
(2) The execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

DECLARATION OF TRUST UNDER THE ARKANSAS CUSTODIAL TRUST ACT

I, ..... (name of owner of property), declare that henceforth I hold as custodial trustee for ..... (name of beneficiary other than transferor) as beneficiary and ..... as distributee on termination of the trust in absence of direction by the beneficiary under the Arkansas Custodial Trust Act, the following: ..... (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).  
Dated: .....

.....  
(Signature)

- (b) Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:
- (1) Registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;
  - (2) Delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in subsection (a)(1);
  - (3) Payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;
  - (4) Registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an

adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;

(5) Delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;

(6) Irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;

(7) Delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;

(8) Execution, delivery, and recordation of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”;

(9) Issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act”; or

(10) Execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: “as custodial trustee for ..... (name of beneficiary) under the Arkansas Custodial Trust Act.”

**History.** Acts 1991, No. 273, § 18.

## **28-72-419. Applicable law.**

(a) This subchapter applies to a transfer or declaration creating a custodial trust that refers to this subchapter if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this state or custodial trust property is located in this state. The custodial trust remains subject to this subchapter despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this state.



(b) A transfer made pursuant to an act of another state substantially similar to this subchapter is governed by the law of that state and may be enforced in this state.

**History.** Acts 1991, No. 273, § 19.

**28-72-420. Uniformity of application and construction.**

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

**History.** Acts 1991, No. 273, § 20.

**28-72-421. Title.**

This subchapter may be cited as the “Arkansas Custodial Trust Act.”

**History.** Acts 1991, No. 273, § 21.

**28-72-422. Severability.**

If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

**History.** Acts 1991, No. 273, § 23.                      273, codified as §§ 28-72-401 — 28-72-422.  
**Meaning of “this act”.** Acts 1991, No.                      422.

**SUBCHAPTER 5 — LONG-TERM INTERGENERATIONAL SECURITY ACT OF 1995**

SECTION.	SECTION.
28-72-501. Short title.	28-72-505. Tax and penalty on earnings.
28-72-502. Legislative intent.	28-72-506. When beneficiary may determine investment.
28-72-503. Definition.	28-72-507. Distribution on death.
28-72-504. Long-term intergenerational security trust agreement.	

**28-72-501. Short title.**

This subchapter shall be known as the “Long-Term Intergenerational Security Act of 1995”.

**History.** Acts 1995, No. 1303, § 1.

**28-72-502. Legislative intent.**

(a) It is found and declared by the General Assembly that the establishment of a long-term intergenerational security trust with tax deferment provisions for an individual under eighteen (18) years of age will enable the individual’s family and friends to take advantage of

long-term growth opportunities and provide for the accumulation of a sizable sum of money for the individual's retirement and financial security.

(b) It is further found and declared that individuals are living longer after retirement and their incomes do not generally grow with inflation and that the additional source of money created by a long-term intergenerational security trust will improve the quality of life of older Arkansans and possibly indirectly reduce present government expenditures.

**History.** Acts 1995, No. 1303, § 2.

### **28-72-503. Definition.**

For purposes of this subchapter, "long-term intergenerational security trust" means a trust established for an individual under eighteen (18) years of age which contains the provisions prescribed in § 28-72-504(a).

**History.** Acts 1995, No. 1303, § 3.

**Cross References.** Tax year — Accounting method, § 26-51-401.

### **28-72-504. Long-term intergenerational security trust agreement.**

(a) The long-term intergenerational security trust agreement must:

(1) Name an Arkansas resident or an entity located in Arkansas as trustee;

(2) Provide that contributions to the trust shall not exceed four thousand dollars (\$4,000) during any taxable year prior to the beneficiary's death;

(3)(A) Provide that the trustee shall not distribute any funds from the trust to the beneficiary of the trust until the beneficiary reaches fifty-five (55) years of age, at which time the trustee shall begin distributing trust funds to the beneficiary.

(B) The funds shall not be deemed to be constructively received when the beneficiary reaches fifty-five (55) years of age; and

(4) Require the trustee to notify the Department of Finance and Administration of all distributions of principal and interest from the trust during the previous taxable year within thirty-one (31) days immediately following the end of the taxable year.

(b) A beneficiary must file a copy of the long-term intergenerational security trust agreement with his or her income tax return for each taxable year the beneficiary claims the tax benefits provided in this subchapter.

**History.** Acts 1995, No. 1303, §§ 5, 6.



**28-72-505. Tax and penalty on earnings.**

(a)(1) All distributions of funds from the long-term intergenerational security trust shall be taxable as provided in the Income Tax Act of 1929.

(2) All distributions from the trust shall be deemed principal until all contributions of principal have been withdrawn.

(b)(1) In addition to any income tax imposed for distributions from the long-term intergenerational security trust as provided in subsection (a) of this section, there is imposed a twenty percent (20%) penalty on all distributions from the trust in violation of this subchapter.

(2) The penalty shall be collected by the Department of Finance and Administration and shall be deposited into the State Treasury as general revenue.

**History.** Acts 1995, No. 1303, §§ 4, 7; 51-406, 26-51-410 — 26-51-412, 26-51-415 — 26-51-417, 26-51-423 — 26-51-431, 26-

**A.C.R.C. Notes.** The Income Tax Act of 1929, referred to in this section, is codified as §§ 26-51-101 — 26-51-107, 26-51-201 — 26-51-204, 26-51-303, 26-51-401 — 26-51-436, 26-51-501, 26-51-801 — 26-51-804, 26-51-806 — 26-51-809, and 26-51-811 — 26-51-815.

**28-72-506. When beneficiary may determine investment.**

Upon reaching eighteen (18) years of age, the beneficiary of a long-term intergenerational security trust may determine, to the extent possible, the manner in which the funds are to be invested.

**History.** Acts 1995, No. 1303, § 9.

**28-72-507. Distribution on death.**

Upon the death of the beneficiary, all funds remaining in the long-term intergenerational security trust shall be distributed to the beneficiary's estate, and all undistributed income shall be included in the beneficiary's final tax return.

**History.** Acts 1995, No. 1303, § 8.

**CHAPTER 73****ARKANSAS TRUST CODE****SUBCHAPTER.**

1. GENERAL PROVISIONS AND DEFINITIONS.
2. JUDICIAL PROCEEDINGS.
3. REPRESENTATION.
4. CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST.
5. CREDITOR'S CLAIMS — SPENDTHRIFT AND DISCRETIONARY TRUSTS.
6. REVOCABLE TRUSTS.
7. OFFICE OF TRUSTEE.
8. DUTIES AND POWERS OF TRUSTEE.
9. UNIFORM PRUDENT INVESTOR ACT.

## SUBCHAPTER

10. LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES.

11. MISCELLANEOUS PROVISIONS.

**SUBCHAPTER 1 — GENERAL PROVISIONS AND DEFINITIONS**

## SECTION.

28-73-101. Short title.

28-73-102. Scope.

28-73-103. Definitions.

28-73-104. Knowledge.

28-73-105. Default and mandatory rules.

28-73-106. Common law of trusts — Principles of equity.

28-73-107. Governing law.

## SECTION.

28-73-108. Principal place of administration.

28-73-109. Methods and waiver of notice.

28-73-110. Others treated as qualified beneficiaries.

28-73-111. Nonjudicial settlement agreements.

28-73-112. Rules of construction.

**28-73-101. Short title.**

This chapter may be cited as the Arkansas Trust Code.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**U. Ark. Little Rock L. Rev.** The Arkansas Trust Code: Good Law for Arkansas. 27 U. Ark. Little Rock L. Rev. 191.

Survey of Legislation, 2005 Arkansas General Assembly, Probate Law, 28 U. Ark. Little Rock L. Rev. 399.

**28-73-102. Scope.**

(a) This chapter applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(b) Notwithstanding subsection (a), this chapter does not apply to public trusts that are governed by § 28-72-201 et seq.

**History.** Acts 2005, No. 1031, § 1.

**28-73-103. Definitions.**

In this chapter:

(1) “Action”, with respect to an act of a trustee, includes a failure to act.

(2) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code of 1986, as in effect on September 1, 2005.

(3) “Beneficiary” means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or



(B) in a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in § 28-73-405(a).

(5) "Community property" means all personal property, wherever situated, which was acquired as or became, and remained, community property under the laws of another jurisdiction, and all real property situated in another jurisdiction which is community property under the laws of that jurisdiction.

(6) "Conservator" means a person appointed by the court pursuant to § 28-67-101 et seq. to administer the estate of an individual who by reason of advanced age or physical disability is unable to manage his or her property.

(7) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(8) "Guardian" means a person appointed by a court pursuant to § 28-65-101 et seq. to have the care and custody of the estate of an incapacitated person.

(9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(10) "Jurisdiction", with respect to a geographic area, includes a state or country.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(12) "Power of withdrawal" means a presently exercisable general power of appointment other than a power exercisable by a trustee which is limited by an ascertainable standard, or which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(13) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

(14) "Qualified beneficiary" means a living beneficiary who on the date the beneficiary's qualification is determined:

(A) is a distributee or permissible distributee of trust income or principal;

(B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision (14)(A) terminated on that date, but the termination of those interests would not cause the trust to terminate; or

(C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(15) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

(16) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one (1) person creates or

contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution, except to the extent another person has the power to revoke or withdraw that portion.

(17) "Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

(18) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(19) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(20) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

(21) "Trustee" includes an original, additional, successor trustee, and a cotrustee.

**History.** Acts 2005, No. 1031, § 1.

**U.S. Code.** Sections 2041(b)(1)(A) and 2514(c)(1) of the Internal Revenue Code of

1986, referred to in (2), are codified as 26

U.S.C. §§ 2041(b)(1)(A) and 2514(c)(1) respectively.

## RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

## CASE NOTES

### Applicability.

Because the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 et seq., did not apply to the adoption of the minor child because she was not an "Indian child" as defined in 25 U.S.C. § 1903(4),

this section did not serve as Arkansas recognition of the tribe and did not apply to grant Indian child status to the minor child. *Vick v. Cecil* (In re A.M.C.), 368 Ark. 369, 246 S.W.3d 426 (2007).

## 28-73-104. Knowledge.

(a) Subject to subsection (b), a person has knowledge of a fact if the person:

- (1) has actual knowledge of it;
- (2) has received a notice or notification of it; or
- (3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust or would have been brought to the employee's attention if



the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-105. Default and mandatory rules.**

(a) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this chapter except:

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- (4) the power of a court to modify or terminate a trust under §§ 28-73-410 — 28-73-416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in § 28-73-501 et seq.;
- (6) the power of a court under § 28-73-702 to require, dispense with, or modify or terminate a bond;
- (7) the power of a court under § 28-73-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the rights under §§ 28-73-1010 — 28-73-1013 of a person other than a trustee or beneficiary;
- (9) periods of limitation for commencing a judicial proceeding;
- (10) the power of a court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- (11) the subject-matter jurisdiction of a court for commencing a proceeding as provided in § 28-73-203.

**History.** Acts 2005, No. 1031, § 1.

### **RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-106. Common law of trusts — Principles of equity.**

The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.

**History.** Acts 2005, No. 1031, § 1.

**28-73-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

- (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or
- (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

**History.** Acts 2005, No. 1031, § 1.

**28-73-108. Principal place of administration.**

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

- (1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or
- (2) all or part of the administration occurs in the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of a court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty (60) days before initiating the transfer. The notice of proposed transfer must include:

- (1) the name of the jurisdiction to which the principal place of administration is to be transferred;
- (2) the address and telephone number at the new location at which the trustee can be contacted;
- (3) an explanation of the reasons for the proposed transfer;
- (4) the date on which the proposed transfer is anticipated to occur; and
- (5) the date, not less than sixty (60) days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.



(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(f) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to § 28-73-704.

(g) Subsections (d) and (e) apply only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-109. Methods and waiver of notice.**

(a) Notice to a person under this chapter or the sending of a document to a person under this chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(b) Notice otherwise required under this chapter or a document otherwise required to be sent under this chapter need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this chapter or the sending of a document under this chapter may be waived by the person to be notified or sent the document.

(d) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-110. Others treated as qualified beneficiaries.**

(a) Whenever notice to qualified beneficiaries of a trust is required under this chapter, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal upon termination of the interests of other distributees or

permissible distributees then receiving or eligible to receive distributions; or

(3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(c) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in § 28-73-408 or § 28-73-409 has the rights of a qualified beneficiary under this chapter.

(d) The Attorney General has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-111. Nonjudicial settlement agreements.**

(a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

(d) Matters that may be resolved by a nonjudicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee’s report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee’s compensation;
- (5) transfer of a trust’s principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request a court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in § 28-73-301 et seq. was adequate, and to determine whether the agreement contains terms and conditions a court could have properly approved.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-112. Rules of construction.**

The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.



**History.** Acts 2005, No. 1031, § 1.

## **SUBCHAPTER 2 — JUDICIAL PROCEEDINGS**

### **SECTION.**

28-73-201. Role of court in administration of trust.

28-73-202. Jurisdiction over trustee and beneficiary.

### **SECTION.**

28-73-203. Subject-matter jurisdiction.

### **28-73-201. Role of court in administration of trust.**

(a) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(b) A trust is not subject to continuing judicial supervision unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-202. Jurisdiction over trustee and beneficiary.**

(a) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of a court of this state regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of a court of this state regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-203. Subject-matter jurisdiction.**

The circuit court has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary concerning the administration of a trust or of other proceedings involving a trust.

**History.** Acts 2005, No. 1031, § 1.

**SUBCHAPTER 3 — REPRESENTATION**

## SECTION.

28-73-301. Representation — Basic effect.

28-73-302. Representation by holder of general testamentary power of appointment.

28-73-303. Representation by fiduciaries and parents.

## SECTION.

28-73-304. Representation by person having substantially identical interest.

28-73-305. Appointment of representative.

**28-73-301. Representation — Basic effect.**

(a) Notice to a person who may represent and bind another person under this subchapter has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this subchapter is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in §§ 28-73-411 and 28-73-602, a person who under this subchapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this subchapter with respect to the termination or modification of a trust under § 28-73-411(a).

**History.** Acts 2005, No. 1031, § 1.

**28-73-302. Representation by holder of general testamentary power of appointment.**

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

**History.** Acts 2005, No. 1031, § 1.

**28-73-303. Representation by fiduciaries and parents.**

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a conservator may represent and bind the estate that the conservator controls;

(2) a guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;



- (4) a trustee may represent and bind the beneficiaries of the trust;
- (5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (6) a parent may represent and bind the parent's minor or unborn child if a guardian for the child has not been appointed.

**History.** Acts 2005, No. 1031, § 1.

### CASE NOTES

#### **Guardian's Duties.**

Chapter 7 debtors who were guardians of a creditor had a fiduciary responsibility to the creditor created by § 28-65-301(b)(2) and this section, and the debtors committed defalcation as fiduciaries by failing to hold the creditor's estate as directed by a court order and by failing to

account for estate funds. Any debt that resulted from the debtors' defalcation was therefore nondischargeable under 11 U.S.C.S. § 523(a)(4). *Anderson v. Sharp* (In re Sharp), — B.R. —, 2008 Bankr. LEXIS 4270 (Bankr. E.D. Ark. Aug. 8, 2008).

#### **28-73-304. Representation by person having substantially identical interest.**

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

**History.** Acts 2005, No. 1031, § 1.

### RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

#### **28-73-305. Appointment of representative.**

(a) If a court determines that an interest is not represented under this subchapter, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) A guardian ad litem may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a guardian ad litem may consider general benefit accruing to the living members of the individual's family.

**History.** Acts 2005, No. 1031, § 1.

#### SUBCHAPTER 4 — CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST

##### SECTION.

- 28-73-401. Methods of creating trust.
- 28-73-402. Requirements for creation.
- 28-73-403. Trusts created in other jurisdictions.
- 28-73-404. Trust purposes.
- 28-73-405. Charitable purposes — Enforcement.
- 28-73-406. Creation of trust induced by fraud, duress, or undue influence.
- 28-73-407. Evidence of oral trust.
- 28-73-408. Trust for care of animal.
- 28-73-409. Noncharitable trust without ascertainable beneficiary.
- 28-73-410. Modification or termination of trust — Proceedings for approval or disapproval.

##### SECTION.

- 28-73-411. Modification or termination of noncharitable irrevocable trust by consent.
- 28-73-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.
- 28-73-413. Cy pres.
- 28-73-414. Modification or termination of uneconomic trust.
- 28-73-415. Reformation to correct mistakes.
- 28-73-416. Modification to achieve settlor's tax objectives.
- 28-73-417. Combination and division of trusts.

#### **28-73-401. Methods of creating trust.**

A trust may be created by:

- (1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) exercise of a power of appointment in favor of a trustee.

**History.** Acts 2005, No. 1031, § 1.

#### **28-73-402. Requirements for creation.**

- (a) A trust is created only if:
  - (1) the settlor has capacity to create a trust;
  - (2) the settlor indicates an intention to create the trust;
  - (3) the trust has a definite beneficiary or is:
    - (A) a charitable trust;
    - (B) a trust for the care of an animal, as provided in § 28-73-408; or
    - (C) a trust for a noncharitable purpose, as provided in § 28-73-409;
  - (4) the trustee has duties to perform; and
  - (5) the same person is not the sole trustee and sole beneficiary.
- (b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
- (c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the



power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

**History.** Acts 2005, No. 1031, § 1.

### RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

### CASE NOTES

#### **Neutral-Principles Approach.**

Circuit court did not err in quieting title in favor of the worship center because, under the neutral-principles approach, nothing in the language of the deed suggested that the owner had the intention of creating a trust in favor of either the national church or the state church, and neither the national church nor the state church had an ownership interest in the

property at the time of the conveyance and neither was a party to the transaction Arkansas Annual Conf. of the AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc., 375 Ark. 428, 291 S.W.3d 562 (2009), cert. denied, Ark. Annual Conf. of the African Methodist Episcopal Church, Inc. v. New Direction Praise & Worship Ctr., Inc., — U.S. —, 130 S. Ct. 70, 175 L. Ed. 2d 26 (2009).

#### **28-73-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) the settlor was domiciled, had a place of abode, or was a national;
- (2) a trustee was domiciled or had a place of business; or
- (3) any trust property was located.

**History.** Acts 2005, No. 1031, § 1.

#### **28-73-404. Trust purposes.**

A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

**History.** Acts 2005, No. 1031, § 1.

#### **28-73-405. Charitable purposes — Enforcement.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one (1) or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-407. Evidence of oral trust.**

Except as required by a statute other than this chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-408. Trust for care of animal.**

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one (1) animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by a court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent a court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

**History.** Acts 2005, No. 1031, § 1.

## **RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.



**28-73-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in § 28-73-408 or by another statute, the following rules apply:

(1) a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than twenty-one (21) years;

(2) a trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by a court; and

(3) property of a trust authorized by this section may be applied only to its intended use, except to the extent a court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-410. Modification or termination of trust — Proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by §§ 28-73-411 — 28-73-414, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under §§ 28-73-411 — 28-73-416, or trust combination or division under § 28-73-417, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under § 28-73-411 may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under § 28-73-413.

**History.** Acts 2005, No. 1031, § 1.

**28-73-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a)(1) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the

modification or termination is inconsistent with a material purpose of the trust.

(2) A settlor's power to consent to a trust's modification or termination may be exercised by:

(A) an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust;

(B) the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or

(C) the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(b) A noncharitable irrevocable trust may be:

(1) terminated upon consent of all of the beneficiaries if a court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or

(2) modified upon consent of all of the beneficiaries if a court concludes that modification is not inconsistent with a material purpose of the trust.

(c) A spendthrift provision in the terms of the trust is presumed to constitute a material purpose of the trust.

(d) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.

(e) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by a court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

**History.** Acts 2005, No. 1031, § 1.

from the version of this section as enacted in Arkansas.

**A.C.R.C. Notes.** Section 411(c) of the Uniform Trust Code (ULA 2005) differs

## **28-73-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

(a) In addition to the procedure available under § 28-69-401 et seq., a court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) A court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.



(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-413. Cy pres.**

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) a court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of a court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) less than thirty (30) years have elapsed since the date of the trust's creation.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than one hundred thousand dollars (\$100,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) A court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(d) This section does not apply to an easement for conservation or preservation.

**History.** Acts 2005, No. 1031, § 1.

### **RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-415. Reformation to correct mistakes.**

A court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

**History.** Acts 2005, No. 1031, § 1.

**28-73-416. Modification to achieve settlor's tax objectives.**

To achieve the settlor's tax objectives, a court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

**History.** Acts 2005, No. 1031, § 1.

**28-73-417. Combination and division of trusts.**

(a)(1) After notice to the qualified beneficiaries, a trustee may combine two (2) or more trusts into a single trust or divide a trust into two (2) or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

(2) A trustee may exercise the authority granted in this section without court approval.

(b) This section does not repeal the Trustee Division of Trusts Act, § 28-69-701 et seq.

**History.** Acts 2005, No. 1031, § 1.

**SUBCHAPTER 5 — CREDITOR'S CLAIMS — SPENDTHRIFT AND DISCRETIONARY TRUSTS**

SECTION.	SECTION.
28-73-501. Rights of beneficiary's creditor or assignee.	28-73-505. Creditor's claim against settlor.
28-73-502. Spendthrift provision.	28-73-506. Overdue distribution.
28-73-503. [Reserved.]	28-73-507. Personal obligations of trustee.
28-73-504. Discretionary trusts — Effect of standard.	

**28-73-501. Rights of beneficiary's creditor or assignee.**

To the extent a beneficiary's interest is not protected by a spendthrift provision, a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.



**History.** Acts 2005, No. 1031, § 1.

### **28-73-502. Spendthrift provision.**

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this subchapter, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

**History.** Acts 2005, No. 1031, § 1.

### **RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

### **CASE NOTES**

#### **Relationship to Bankruptcy Laws.**

Although debtor, acting as executrix, retained control over the assets in the testator's estate, and she may have improperly exercised that control in her capacity as executrix, her conduct in that capacity did not invalidate the spendthrift provision; because the spendthrift provision was enforceable under subsection (a) of this section, debtor's interest in the net

income from the trust was subject to a restriction on transfer under applicable nonbankruptcy law, the 11 U.S.C.S. § 541(c)(2) exception applied, and debtor's interest in the distributions of net income from the trust was not a part of her bankruptcy estate. *Wetzel v. Regions Bank*, — F.3d —, 2011 U.S. App. LEXIS 16629 (8th Cir. Aug. 12, 2011).

### **28-73-503. [Reserved.]**

**A.C.R.C. Notes.** Section 503 of the Uniform Trust Code (ULA 2005), concerning

exceptions to a spendthrift provision, was not adopted in Arkansas.

### **28-73-504. Discretionary trusts — Effect of standard.**

(a) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(b) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution. Under § 28-73-

814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

(c) A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

**History.** Acts 2005, No. 1031, § 1.

**A.C.R.C. Notes.** Section 504 of the Uniform Trust Code (ULA 2005) differs from

the version of this section as enacted in Arkansas.

### **28-73-505. Creditor's claim against settlor.**

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors; and

(2) with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one (1) settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986 or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on January 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

**U.S. Code.** Section 2041(b)(2), 2514(e) and 2503(b) of the Internal Revenue Code

of 1986, referred to in (b)(2), are codified as 26 U.S.C. §§ 2041(b)(2), 2514(e) and 2503(b) respectively.

### **28-73-506. Overdue distribution.**

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

**History.** Acts 2005, No. 1031, § 1.



**28-73-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

**History.** Acts 2005, No. 1031, § 1.

**SUBCHAPTER 6 — REVOCABLE TRUSTS****SECTION.**

28-73-601. Capacity of settlor of revocable trust.

28-73-602. Revocation or amendment of revocable trust.

28-73-603. Settlor's powers — Powers of withdrawal.

**SECTION.**

28-73-604. Limitation on action contesting validity of revocable trust — Distribution of trust property.

**28-73-601. Capacity of settlor of revocable trust.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

**History.** Acts 2005, No. 1031, § 1.

**28-73-602. Revocation or amendment of revocable trust.**

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before September 1, 2005.

(b) If a revocable trust is created or funded by more than one (1) settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) executing a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(B) any other method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

**History.** Acts 2005, No. 1031, § 1.

#### RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

### **28-73-603. Settlor's powers — Powers of withdrawal.**

(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-604. Limitation on action contesting validity of revocable trust — Distribution of trust property.**

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) three (3) years after the settlor's death; or

(2) ninety (90) days after the trustee sent the person a notice informing the person of the trust's existence, the settlor's name, the trustee's name and address, the time allowed for commencing a proceeding, and a description of the beneficiary's interest, if any.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property



in accordance with the terms of the trust. The trustee is not subject to liability for the distribution unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty (60) days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

**History.** Acts 2005, No. 1031, § 1.

## RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

## SUBCHAPTER 7 — OFFICE OF TRUSTEE

### SECTION.

28-73-701. Accepting or declining trusteeship.

28-73-702. Trustee's bond.

28-73-703. Cotrustees.

28-73-704. Vacancy in trusteeship — Appointment of successor.

### SECTION.

28-73-705. Resignation of trustee.

28-73-706. Removal of trustee.

28-73-707. Delivery of property by former trustee.

28-73-708. Compensation of trustee.

28-73-709. Reimbursement of expenses.

## 28-73-701. Accepting or declining trusteeship.

(a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:

(1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-702. Trustee's bond.**

(a) A trustee shall give bond to secure performance of the trustee's duties only if a court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) A court may specify the amount of a bond, its liabilities, and whether sureties are necessary. A court may modify or terminate a bond at any time.

(c) A regulated financial service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-703. Cotrustees.**

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

**History.** Acts 2005, No. 1031, § 1.



**28-73-704. Vacancy in trusteeship — Appointment of successor.**

- (a) A vacancy in a trusteeship occurs if:
- (1) a person designated as trustee rejects the trusteeship;
  - (2) a person designated as trustee cannot be identified or does not exist;
  - (3) a trustee resigns;
  - (4) a trustee is disqualified or removed;
  - (5) a trustee dies; or
  - (6) a guardian of the person or conservator is appointed for an individual serving as trustee.
- (b) If one (1) or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.
- (c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
- (1) by a person designated in the terms of the trust to act as successor trustee;
  - (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
  - (3) by a person appointed by a court.
- (d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
- (1) by a person designated in the terms of the trust to act as successor trustee;
  - (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the Attorney General concurs in the selection; or
  - (3) by a person appointed by a court.
- (e) Whether or not a vacancy in a trusteeship exists or is required to be filled, a court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-705. Resignation of trustee.**

- (a) A trustee may resign:
- (1) upon at least thirty (30) days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
  - (2) with the approval of a court.
- (b) In approving a resignation, a court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

(d) Subsection (a) applies only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-706. Removal of trustee.**

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) A court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under § 28-73-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-707. Delivery of property by former trustee.**

(a) Unless a cotrustee remains in office or a court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

**History.** Acts 2005, No. 1031, § 1.



**28-73-708. Compensation of trustee.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

**History.** Acts 2005, No. 1031, § 1.

**28-73-709. Reimbursement of expenses.**

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

**History.** Acts 2005, No. 1031, § 1.

**SUBCHAPTER 8 — DUTIES AND POWERS OF TRUSTEE****SECTION.**

- 28-73-801. Duty to administer trust.
- 28-73-802. Duty of loyalty.
- 28-73-803. Impartiality.
- 28-73-804. Prudent administration.
- 28-73-805. Costs of administration.
- 28-73-806. Trustee's skills.
- 28-73-807. Delegation by trustee.
- 28-73-808. Powers to direct.
- 28-73-809. Control and protection of trust property.
- 28-73-810. Recordkeeping and identification of trust property.

**SECTION.**

- 28-73-811. Enforcement and defense of claims.
- 28-73-812. Collecting trust property.
- 28-73-813. Duty to inform and report.
- 28-73-814. Discretionary powers — Tax savings.
- 28-73-815. General powers of trustee.
- 28-73-816. Specific powers of trustee.
- 28-73-817. Distribution upon termination.

**28-73-801. Duty to administer trust.**

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-802. Duty of loyalty.**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in § 28-73-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by a court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by § 28-73-1005;
- (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with § 28-73-1009; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse;
- (2) the trustee's descendants, siblings, parents, or their spouses;
- (3) an agent or attorney of the trustee; or
- (4) a corporation or other person or enterprise in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f)(1) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of § 28-73-901 et seq.



(2) The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust.

(3) If the trustee receives compensation from the investment company or investment trust for providing management services, the trustee shall at least annually notify the persons entitled under § 28-73-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) A court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

(j) Subsections (b)-(e) apply only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-803. Impartiality.**

If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

**History.** Acts 2005, No. 1031, § 1.

**28-73-805. Costs of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

**History.** Acts 2005, No. 1031, § 1.

**28-73-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

**History.** Acts 2005, No. 1031, § 1.

**28-73-807. Delegation by trustee.**

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of a court of this state.

**History.** Acts 2005, No. 1031, § 1.

**28-73-808. Powers to direct.**

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.



(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-810. Recordkeeping and identification of trust property.**

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two (2) or more separate trusts.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-813. Duty to inform and report.**

(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless

unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within sixty (60) days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number; and

(3) within sixty (60) days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries:

(A) of the trust's existence;

(B) of the identity of the settlor or settlors;

(C) of the right to request a copy of the trust instrument;

(D) of the right to a trustee's report as provided in subsection (c); and

(E) in advance of any change in the method or rate of the trustee's compensation.

(c)(1) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

(2) Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee.

(3) A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (a)-(c) apply only to an irrevocable trust created on or after September 1, 2005, and to a revocable trust which becomes irrevocable on or after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

## **28-73-814. Discretionary powers — Tax savings.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary



power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, a court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or Section 2523(e) of the Internal Revenue Code of 1986, as in effect on January 1, 2005, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on January 1, 2005.

**History.** Acts 2005, No. 1031, § 1.  
**U.S. Code.** Sections 2056(B)(5), 2523(e) and 2503(c) of the Internal Revenue Code of 1986, referred to in (d)(1)

and (d)(3), are codified as 26 U.S.C. §§ 2056(b)(5), 2523(e) and 2503(c), respectively.

## **28-73-815. General powers of trustee.**

(a) A trustee, without authorization by a court, may exercise:

(1) powers conferred by the terms of the trust; and

(2) except as limited by the terms of the trust:

(A) all powers over the trust property which an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) any other powers conferred by this chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this subchapter.

**History.** Acts 2005, No. 1031, § 1.

**28-73-816. Specific powers of trustee.**

Without limiting the authority conferred by § 28-73-815, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell property, for cash or on credit, at public or private sale;

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a regulated financial service institution;

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of a business organization or contributing additional capital;

(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(C) pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights; and

(D) deposit the securities with a depository or other regulated financial service institution;

(8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;



(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(16) exercise elections with respect to federal, state, and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under the Arkansas Uniform Transfers to Minors Act, § 9-26-201 et seq., or custodial trustee under the Arkansas Custodial Trust Act, § 28-72-401 et seq., and, for that purpose, creating a custodianship or custodial trust;

(C) if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-817. Distribution upon termination.**

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty (30) days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.



**History.** Acts 2005, No. 1031, § 1.

## SUBCHAPTER 9 — UNIFORM PRUDENT INVESTOR ACT

### SECTION.

28-73-901. Prudent investor rule.

28-73-902. Standard of care — Portfolio strategy — Risk and return objectives.

28-73-903. Diversification.

28-73-904. Duties at inception of trusteeship.

### SECTION.

28-73-905. Reviewing compliance.

28-73-906. Language invoking standard of subchapter.

28-73-907. Application to existing trusts.

28-73-908. Uniformity of application and construction.

### **28-73-901. Prudent investor rule.**

(a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this subchapter.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-902. Standard of care — Portfolio strategy — Risk and return objectives.**

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (1) general economic conditions;
- (2) the possible effect of inflation or deflation;
- (3) the expected tax consequences of investment decisions or strategies;
- (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this subchapter.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-903. Diversification.**

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-904. Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this subchapter.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-905. Reviewing compliance.**

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-906. Language invoking standard of subchapter.**

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this subchapter: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their



capital”, “prudent man rule”, “prudent trustee rule”, “prudent person rule”, and “prudent investor rule”.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-907. Application to existing trusts.**

This subchapter applies to trusts existing on and created after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-908. Uniformity of application and construction.**

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among the states enacting it.

**History.** Acts 2005, No. 1031, § 1.

## **SUBCHAPTER 10 — LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEES**

#### **SECTION.**

- 28-73-1001. Remedies for breach of trust.
- 28-73-1002. Damages for breach of trust.
- 28-73-1003. Damages in absence of breach.
- 28-73-1004. Attorney's fees and costs.
- 28-73-1005. Limitation of action against trustee.
- 28-73-1006. Reliance on trust instrument.
- 28-73-1007. Event affecting administration or distribution.

#### **SECTION.**

- 28-73-1008. Exculpation of trustee.
- 28-73-1009. Beneficiary's consent, release, or ratification.
- 28-73-1010. Limitation on personal liability of trustee.
- 28-73-1011. Interest as general partner.
- 28-73-1012. Protection of person dealing with trustee.
- 28-73-1013. Certification of trust.

### **28-73-1001. Remedies for breach of trust.**

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in § 28-73-706;
- (8) reduce or deny compensation to the trustee;

- (9) subject to § 28-73-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-1002. Damages for breach of trust.**

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one (1) trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-1003. Damages in absence of breach.**

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

**History.** Acts 2005, No. 1031, § 1.

### **28-73-1004. Attorney's fees and costs.**

In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

**History.** Acts 2005, No. 1031, § 1.



## CASE NOTES

**Attorney's Fees Proper.**

This section gave a circuit court the discretion to award a widow her attorney's fees to be paid by two coexecutors of a decedent's estate because (1) the widow's petition seeking a construction of the will necessarily involved a construction of a trust instrument as well because the will devised to the coexecutors, as trustees, all of the decedent's property not otherwise disposed of in the trusts created for the benefit of the widow and the older chil-

dren, and (2) an action to determine whether certain property was an asset of a trust was an action involving the administration of a trust within the meaning of this section. The circuit court was not required to grant the widow her fees on each particular issue. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 625 (Aug. 20, 2008).

**28-73-1005. Limitation of action against trustee.**

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five (5) years after the first to occur of:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.

**History.** Acts 2005, No. 1031, § 1.

## RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1008. Exculpation of trustee.**

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

(c) This section applies only to irrevocable trusts created on or after September 1, 2005, and to revocable trusts which become irrevocable on or after September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-1009. Beneficiary's consent, release, or ratification.**

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

**History.** Acts 2005, No. 1031, § 1.



**28-73-1010. Limitation on personal liability of trustee.**

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-1011. Interest as general partner.**

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act (1996), § 4-46-101 et seq., or the Revised Limited Partnership Act of 1991, § 4-43-101 et seq. [repealed].

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one (1) or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1012. Protection of person dealing with trustee.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**28-73-1013. Certification of trust.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) a statement that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and

(7) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.



(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f)(1) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification.

(2) Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if a court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

**History.** Acts 2005, No. 1031, § 1.

**RESEARCH REFERENCES**

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

**SUBCHAPTER 11 — MISCELLANEOUS PROVISIONS**

SECTION.	SECTION.
28-73-1101. Uniformity of application and construction.	28-73-1104. Effective date.
28-73-1102. Electronic records and signatures.	28-73-1105. [Reserved.]
28-73-1103. Severability clause.	28-73-1106. Application to existing relationships.

**28-73-1101. Uniformity of application and construction.**

In applying and construing this chapter consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1102. Electronic records and signatures.**

The provisions of this chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1103. Severability clause.**

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1104. Effective date.**

This chapter takes effect on September 1, 2005.

**History.** Acts 2005, No. 1031, § 1.

**28-73-1105. [Reserved.]**

**A.C.R.C. Notes.** Section 1105 of the Uniform Trust Code (ULA 2005), a repealer provision, was not adopted in Arkansas.

**28-73-1106. Application to existing relationships.**

(a) Except as otherwise provided in this chapter, on September 1, 2005:

(1) this chapter applies to all trusts created before, on, or after September 1, 2005;

(2) this chapter applies to all judicial proceedings concerning trusts commenced on or after September 1, 2005;

(3) this chapter applies to judicial proceedings concerning trusts commenced before September 1, 2005, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this chapter applies to trust instruments executed before September 1, 2005, unless there is a clear indication of a contrary intent in the terms of the trust; and



(5) an act done before September 1, 2005, is not affected by this chapter.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before September 1, 2005, that statute continues to apply to the right even if it has been repealed or superseded.

**History.** Acts 2005, No. 1031, § 1.

RESEARCH REFERENCES

**Ark. L. Notes.** Circo, How Does the Arkansas Trust Code Affect Real Estate Transactions?, 2007 Ark. L. Notes 45.

CHAPTER 74

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. JURISDICTION.
- 3. TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP.
- 4. REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES.
- 5. MISCELLANEOUS PROVISIONS.

**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 28-74-101. Short title.
- 28-74-102. Definitions.
- 28-74-103. International application of chapter.
- 28-74-104. Communication between courts.

SECTION.

- 28-74-105. Cooperation between courts.
- 28-74-106. Taking testimony in another state.

**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

**28-74-101. Short title.**

This chapter may be cited as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

**History.** Acts 2011, No. 159, § 1.

**28-74-102. Definitions.**

In this chapter:

(1) “Adult” means an individual who has attained eighteen (18) years of age.

(2) “Conservator” means a person appointed by the court to administer the property of an adult, including a person appointed under § 28-67-105.

(3) “Guardian” means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under the Adult Maltreatment Custody Act, § 9-20-101 et seq., § 28-65-201 et seq., and the Uniform Veterans’ Guardianship Act, § 28-66-101 et seq.

(4) “Guardianship order” means an order appointing a guardian.

(5) “Guardianship proceeding” means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

(6) “Incapacitated person” means an adult for whom a guardian has been appointed.

(7) “Party” means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.

(8) “Person,” except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) “Protected person” means an adult for whom a protective order has been issued.

(10) “Protective order” means an order appointing a conservator or other order related to management of an adult’s property.

(11) “Protective proceeding” means a judicial proceeding in which a protective order is sought or has been issued.

(12) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) “Respondent” means an adult for whom a protective order or the appointment of a guardian is sought.

(14) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.



**History.** Acts 2011, No. 159, § 1.

### **28-74-103. International application of chapter.**

A court of this state may treat a foreign country as if it were a state for the purpose of applying this subchapter, § 28-74-201 et seq., § 28-74-301 et seq., and § 28-74-501 et seq.

**History.** Acts 2011, No. 159, § 1.

### **28-74-104. Communication between courts.**

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (b), the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(b) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

**History.** Acts 2011, No. 159, § 1.

### **28-74-105. Cooperation between courts.**

(a) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

- (1) hold an evidentiary hearing;
- (2) order a person in that state to produce evidence or give testimony pursuant to procedures of that state;
- (3) order that an evaluation or assessment be made of the respondent;
- (4) order any appropriate investigation of a person involved in a proceeding;
- (5) forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (1) or any other proceeding, any evidence otherwise produced under paragraph (2), and any evaluation or assessment prepared in compliance with an order under paragraph (3) or (4);
- (6) issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;

(7) issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 C.F.R. Section 160.103 as it existed on January 15, 2011.

(b) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (a), a court of this state has jurisdiction for the limited

purpose of granting the request or making reasonable efforts to comply with the request.

**History.** Acts 2011, No. 159, § 1.

### **28-74-106. Taking testimony in another state.**

(a) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

**History.** Acts 2011, No. 159, § 1.

## **SUBCHAPTER 2 — JURISDICTION**

### **SECTION.**

28-74-201. Definitions — Significant connection factors.

28-74-202. Exclusive basis.

28-74-203. Jurisdiction.

28-74-204. Special jurisdiction.

28-74-205. Exclusive and continuing jurisdiction.

### **SECTION.**

28-74-206. Appropriate forum.

28-74-207. Jurisdiction declined by reason of conduct.

28-74-208. Notice of proceeding.

28-74-209. Proceedings in more than one state.

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**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

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### **28-74-201. Definitions — Significant connection factors.**

(a) In this subchapter:

(1) “Emergency” means a circumstance that likely will result in substantial harm to a respondent’s health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent’s behalf;



(2) “Home state” means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(3) “Significant-connection state” means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) In determining under §§ 28-74-203 and 28-74-301(e) whether a respondent has a significant connection with a particular state, the court shall consider:

(1) the location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding;

(2) the length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) the location of the respondent’s property; and

(4) the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver’s license, social relationship, and receipt of services.

**History.** Acts 2011, No. 159, § 1.

### **28-74-202. Exclusive basis.**

This subchapter provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

**History.** Acts 2011, No. 159, § 1.

### **28-74-203. Jurisdiction.**

A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(1) this state is the respondent’s home state;

(2) on the date the petition is filed, this state is a significant-connection state and:

(A) the respondent does not have a home state or a court of the respondent’s home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(B) the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(i) a petition for an appointment or order is not filed in the respondent’s home state;

- (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and
- (iii) the court in this state concludes that it is an appropriate forum under the factors set forth in § 28-74-206;
- (3) this state does not have jurisdiction under either paragraph (1) or (2), the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or
- (4) the requirements for special jurisdiction under § 28-74-204 are met.

**History.** Acts 2011, No. 159, § 1.

### **28-74-204. Special jurisdiction.**

(a) A court of this state lacking jurisdiction under § 28-74-203(1)-(3) has special jurisdiction to do any of the following:

(1) appoint a guardian in an emergency for a term not exceeding ninety (90) days for a respondent who is physically present in this state;

(2) issue a protective order with respect to real or tangible personal property located in this state;

(3) appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to § 28-74-301.

(b) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

(c)(1) A court of this state lacking jurisdiction under § 28-74-203(1)-(3) has special jurisdiction regarding maltreated adults, as defined under § 9-20-103, when the maltreated adult is present in Arkansas or the maltreatment occurred in Arkansas and the Department of Human Services takes emergency custody of the maltreated adult or files a petition under the Adult Custody Maltreatment Act, § 9-20-101 et seq.

(2) Special jurisdiction shall continue, and any orders issued shall remain in effect until an order is obtained from a court of a state having jurisdiction over the maltreatment matter.

**History.** Acts 2011, No. 159, § 1.

### **28-74-205. Exclusive and continuing jurisdiction.**

Except as otherwise provided in § 28-74-204, a court that has appointed a guardian or issued a protective order consistent with this chapter has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.



**History.** Acts 2011, No. 159, § 1.

### **28-74-206. Appropriate forum.**

(a) A court of this state having jurisdiction under § 28-74-203 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of this state declines to exercise its jurisdiction under subsection (a), it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

- (1) any expressed preference of the respondent;
- (2) whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- (3) the length of time the respondent was physically present in or was a legal resident of this or another state;
- (4) the distance of the respondent from the court in each state;
- (5) the financial circumstances of the respondent's estate;
- (6) the nature and location of the evidence;
- (7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- (8) the familiarity of the court of each state with the facts and issues in the proceeding; and
- (9) if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

**History.** Acts 2011, No. 159, § 1.

### **28-74-207. Jurisdiction declined by reason of conduct.**

(a) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

- (1) decline to exercise jurisdiction;
- (2) exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or
- (3) continue to exercise jurisdiction after considering:
  - (A) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(B) whether it is a more appropriate forum than the court of any other state under the factors set forth in § 28-74-206(c); and

(C) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of § 28-74-203.

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this chapter.

**History.** Acts 2011, No. 159, § 1.

### **28-74-208. Notice of proceeding.**

If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state, except that in a proceeding under the Adult Custody Maltreatment Act, § 9-20-101 et seq., the Department of Human Services shall provide only the notice required by the Adult Custody Maltreatment Act, § 9-20-101 et seq. The notice must be given in the same manner as notice is required to be given in this state.

**History.** Acts 2011, No. 159, § 1.

### **28-74-209. Proceedings in more than one state.**

Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under § 28-74-204(a)(1) or (2) or § 28-74-204(c), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(1) If the court in this state has jurisdiction under § 28-74-203, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to § 28-74-203 before the appointment or issuance of the order.

(2) If the court in this state does not have jurisdiction under § 28-74-203, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall



dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

**History.** Acts 2011, No. 159, § 1.

### SUBCHAPTER 3 — TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

SECTION.

28-74-301. Transfer of guardianship or conservatorship to another state.

SECTION.

28-74-302. Accepting guardianship or conservatorship transferred from another state.

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**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

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#### **28-74-301. Transfer of guardianship or conservatorship to another state.**

(a) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(b) Notice of a petition under subsection (a) must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) the incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(3) plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(e) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected

person has a significant connection to the other state considering the factors in § 28-74-201(b);

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) adequate arrangements will be made for management of the protected person's property.

(f) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to § 28-74-302; and

(2) the documents required to terminate a guardianship or conservatorship in this state.

**History.** Acts 2011, No. 159, § 1.

### **28-74-302. Accepting guardianship or conservatorship transferred from another state.**

(a) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to § 28-74-301, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subsection (a) must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (a).

(d) The court shall issue an order provisionally granting a petition filed under subsection (a) unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) the guardian or conservator is ineligible for appointment in this state.

(e) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to § 28-74-301 transferring the proceeding to this state.

(f) Not later than ninety (90) days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall



determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(h) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under the Adult Maltreatment Custody Act, § 9-20-101 et seq., § 28-65-201 et seq., the Uniform Veterans' Guardianship Act, § 28-66-101 et seq., and § 28-67-101 et seq. if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

**History.** Acts 2011, No. 159, § 1.

#### **SUBCHAPTER 4 — REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES**

**SECTION.**

28-74-401. Registration of guardianship orders.

28-74-402. Registration of protective orders.

**SECTION.**

28-74-403. Effect of registration.

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**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

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#### **28-74-401. Registration of guardianship orders.**

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

**History.** Acts 2011, No. 159, § 1.

#### **28-74-402. Registration of protective orders.**

If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in

which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

**History.** Acts 2011, No. 159, § 1.

**28-74-403. Effect of registration.**

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this chapter and other law of this state to enforce a registered order.

**History.** Acts 2011, No. 159, § 1.

**SUBCHAPTER 5 — MISCELLANEOUS PROVISIONS**

**SECTION.**

28-74-501. Uniformity of application and construction.  
28-74-502. Relation to Electronic Signatures in Global and National Commerce Act.

**SECTION.**

28-74-503. [Reserved.]  
28-74-504. Transitional provision.  
28-74-505. Effective date.

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**Effective Dates.** Acts 2011, No. 159,  
§ 1: Jan. 1, 2012.

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**28-74-501. Uniformity of application and construction.**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History.** Acts 2011, No. 159, § 1.

**Meaning of “this act”.** Acts 2011, No. 159, § 1, codified as § 28-74-101 et seq.

**28-74-502. Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of



any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

**History.** Acts 2011, No. 159, § 1.

### **28-74-503. [Reserved.]**

### **28-74-504. Transitional provision.**

(a) This act applies to guardianship and protective proceedings begun on or after January 1, 2012.

(b) Section 28-74-101 et seq., § 28-74-301 et seq., § 28-74-401 et seq., and §§ 28-74-501 and 28-74-502 apply to proceedings begun before January 1, 2012, regardless of whether a guardianship or protective order has been issued.

**History.** Acts 2011, No. 159, § 1.

28-65-103, 28-65-107, 28-65-604, and 28-67-102.

**Meaning of “this act”.** Acts 2011, No. 159, codified as § 28-74-101 et seq. and §§

### **28-74-505. Effective date.**

This act takes effect on January 1, 2012.

**History.** Acts 2011, No. 159, § 1.

28-65-103, 28-65-107, 28-65-604, and 28-67-102.

**Meaning of “this act”.** Acts 2011, No. 159, codified as § 28-74-101 et seq. and §§

**TITLE 28 — APPENDIX**  
**ADMINISTRATIVE ORDER NUMBER 12 — OFFICIAL**  
**PROBATE FORMS**

The Per Curiam Order of the Supreme Court of Arkansas of January 28, 1999, adopted the revised Official Probate Forms by way of Administrative Order Number 12. The Administrative Order is set out in this appendix for easy reference and includes the revised Official Probate Forms.

**PER CURIAM:** “The 1998 report of the Arkansas Supreme Court Committee on Civil Practice contained a proposal to revise the Official Probate Forms. The Committee’s suggestions were published in our per curiam order of November 5, 1998 so that members of the bench and bar could have an opportunity to comment. We thank those who took the time to review the proposals and submit comments.

We hereby adopt, effective immediately, and republish the Official Probate Forms as set out below. These official forms supersede all earlier versions. We again express our gratitude to the members of our Civil Practice Committee.

We are adopting the revised Official Probate Forms by way of Administrative Order Number 12; however, we direct that the forms themselves not be published in the *Arkansas Court Rules Volume* published every year. The forms will be published this one time by this per curiam order and will be permanently memorialized in the *Arkansas Reports*.

We direct that with respect to Administrative Order Number 12 only the following appear in the *Arkansas Court Rules Volume*:

‘ADMINISTRATIVE ORDER NUMBER 12  
OFFICIAL PROBATE FORMS

The Court, pursuant to Ark. Code Ann. § 28-1-114 [repealed] and its constitutional and inherent powers to regulate procedure in the courts, has adopted thirty-three probate forms. These official forms supersede all earlier versions. The forms are published in 336 Ark. Appendix (1999).’

**[The materials appearing below shall not be published in the Arkansas Court Rules.]**

ADMINISTRATIVE ORDER NUMBER 12  
OFFICIAL PROBATE FORMS

**Section 1. Authority.**

The Court, pursuant to Ark. Code Ann. § 28-1-114 [repealed] and its



constitutional and inherent powers to regulate procedure in the courts, adopts the following probate forms. These official forms supersede all earlier versions.

**Section 2. Captions and Affidavits.**

When the word ‘caption’ appears on a form, the following format should be used:

In The Circuit Court of \_\_\_\_\_ County, Arkansas  
Probate Division

In The Matter of the Estate of  
\_\_\_\_\_, Deceased No. \_\_\_\_\_

-OR-

In the Matter of \_\_\_\_\_,  
An Incapacitated Person

When the word ‘affidavit’ appears on a form, the following format should be used:

STATE OF ARKANSAS  
COUNTY OF \_\_\_\_\_

Subscribed and sworn to before me on [date].

\_\_\_\_\_  
[Signature]

\_\_\_\_\_  
[Official Title]

(Seal)

My commission expires: \_\_\_\_\_

**Reporter’s Notes to Section 2:** The statutes governing guardianship proceedings, Ark. Code Ann. §§ 28-65-101 — 28-65-603, use the term ‘incapacitated person’ to refer both to persons who are impaired by reason of various forms of

disability and to persons under the age of 18 whose disabilities have not been removed. The term ‘minor’ may be used with respect to the latter.  
By statute, [e]very application to the [probate] court, unless otherwise pro-

vided, shall be by petition signed and verified by or on behalf of the petitioner.' Ark. Code Ann. § 28-1-109(a). Other documents require verification only if the gov-

erning statute so provides. These statutes are cited in the Reporter's Notes accompanying those forms, other than applications, that require an affidavit.

### Section 3. Forms.

#### Form 1.

[Caption]

#### DEMAND FOR NOTICE OF PROCEEDINGS FOR PROBATE OF WILL OR APPOINTMENT OF PERSONAL REPRESENTATIVE

The undersigned, \_\_\_\_\_, respectfully demands notice of any proceeding to probate a will of \_\_\_\_\_, deceased, who resided at \_\_\_\_\_, Arkansas, or for the appointment of a personal representative to administer [his] [her] estate.

My address is \_\_\_\_\_.

My interest in the estate is that of \_\_\_\_\_.

My attorney, authorized to represent me in this proceeding, and to accept notice for me, is \_\_\_\_\_, whose address is \_\_\_\_\_.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_

[Signature]

**Reporter's Notes to Form 1:** See Ark. Code Ann. § 28-40-108(a).

#### Form 2.

[Caption]

#### PETITION FOR APPOINTMENT OF [ADMINISTRATOR] [ADMINISTRATRIX]

\_\_\_\_\_, whose address is \_\_\_\_\_, and whose interest in the decedent's estate is that of \_\_\_\_\_, petitions that letters of administration of the estate be issued. The facts known to petitioner are:



1. The decedent, \_\_\_\_\_, aged \_\_\_\_\_, who resided at \_\_\_\_\_ in \_\_\_\_\_ County, Arkansas, died intestate at \_\_\_\_\_ on or about [date].

2. The surviving spouse and heirs of the decedent, and their respective ages, relationships to the decedent, and residence addresses, are:

Name	Age	Relationship	Residence Address
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. The probable value of the decedent’s estate is:

Real property \$ \_\_\_\_\_

Personal property \$ \_\_\_\_\_

4. Petitioner nominates \_\_\_\_\_, whose residence address is \_\_\_\_\_, for appointment as [administrator] [administratrix] of the estate. The relationship, if any, of the nominee to the decedent, and other facts, if any, which entitle the nominee to appointment are: \_\_\_\_\_.

THEREFORE, petitioner requests that this court make an order determining the fact of the death and of the intestacy of the decedent, and appointing petitioner’s nominee [administrator] [administratrix] of the estate.

\_\_\_\_\_

[Signature of Petitioner]

[Affidavit]

**Reporter’s Notes to Form 2:** See Ark. Code Ann. § 28-40-107. The term “heir” is defined by statute as “a person entitled by the law of descent and distribution to the

real and personal property of an intestate decedent, but does not include a surviving spouse.” Ark. Code Ann. § 28-1-102(a)(10).

**Form 3.**

[Caption]

PETITION FOR PROBATE OF WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE

\_\_\_\_\_, whose address is \_\_\_\_\_, and whose interest in the decedent's estate is that of \_\_\_\_\_, petitions that a certain written instrument be admitted to probate as the last will of the decedent, and for the appointment of a personal representative. The facts known to petitioner are:

1. The decedent, \_\_\_\_\_, aged \_\_\_\_\_, who resided at \_\_\_\_\_ in \_\_\_\_\_ County, Arkansas, died at \_\_\_\_\_ on or about [date].

2. The decedent left as his last will a written instrument dated the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, which has been filed in this court. Proof of its execution in the manner required by law has been made or will be made at the time of presentation of this petition.

3. The surviving spouse, heirs, and devisees of the decedent, and their respective ages, relationships to the decedent, and residence addresses, are:

Name	Age	Relationship	Residence Address
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. The probable value of the decedent's estate is:

Real property \$ \_\_\_\_\_

Personal property \$ \_\_\_\_\_

5. The will of the decedent nominates \_\_\_\_\_ as [executor] [executrix]. (Petitioner nominates \_\_\_\_\_ for appointment as \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_ to administer the estate.) The relationship, if any, of the nominee to the decedent, and other facts, if any, which entitle the nominee to appointment are: \_\_\_\_\_.

THEREFORE, petitioner requests that this court make an order determining (1) the fact of the death of the decedent; (2) that the proffered instrument was executed in all respects according to law when the testator was competent to do so and acting without undue influence, fraud or restraint, has not been revoked and is decedent's last will; and (3) appointing the nominee to administer the decedent's estate.

\_\_\_\_\_  
[Signature of Petitioner]



[Affidavit]

**Reporter’s Notes to Form 3:** See Ark. Code Ann. § 28-40-107. The sentence in parentheses in paragraph 5 is to be substituted for the preceding sentence if the petitioner seeks appointment of a personal representative who is not nominated in the decedent’s will.

**Form 4.**

[Caption]

PROOF OF WILL

I, \_\_\_\_\_, state on oath:

I am one of the subscribing witnesses to the attached written instrument, dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_, which purports to be (a codicil to) the last will of \_\_\_\_\_, deceased. On the execution date of the instrument the [testator] [testatrix], in my presence, and in the presence of the other attesting witnesses, signed the instrument at the end, or acknowledged [his] [her] signature, declared the instrument to be [his] [her] will, and requested that I attest [his] [her] execution of it. Then, in the presence of the [testator] [testatrix] and the other witnesses, I signed my name as an attesting witness. At the time of execution of the instrument, the [testator] [testatrix] appeared to be eighteen years of age or older, of sound mind, and acting without undue influence, fraud or restraint.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature]

[Affidavit]

**Reporter’s Notes to Form 4:** This form is designed for execution and filing with the court when the original will did not include a “proof of will.” Because it is not always practical to have multiple witnesses appear simultaneously, the form is for a single witness. This form is for an attested will and should not be used for a holographic will. An attested will must be proved by at least two attesting witnesses or as otherwise provided by statute. Ark. Code Ann. § 28-40-117(a). If the instrument is a codicil, the language in parentheses should be included. An affidavit is required by Ark. Code Ann. § 28-40-118(a).

**Form 5.**

[Caption]

NOTICE OF HEARING ON PETITION

To all persons interested in the estate of \_\_\_\_\_, deceased:

You are hereby notified that a petition has been filed in this court (to admit to probate the will of \_\_\_\_\_, and) for the appointment of a personal representative for this estate; that this petition will be heard at \_\_\_\_ o'clock \_\_\_\_m. on [date], at \_\_\_\_\_, or at a later time or other place to which the hearing may be adjourned or transferred.

Date: \_\_\_\_\_, \_\_\_\_

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

**Reporter's Notes to Form 5:** See Ark. Code Ann. § 28-40-110. The language in parentheses should be used when the petitioner seeks probate of a will.

## Form 6.

[Caption]

### BOND OF PERSONAL REPRESENTATIVE

The undersigned, \_\_\_\_\_, as principal, having been appointed [executor] [executrix] of the will of (or [administrator] [administratrix] of the estate of) \_\_\_\_\_, deceased, and \_\_\_\_\_, as suret \_\_\_\_\_, acknowledge themselves to be jointly and severally obligated to the State of Arkansas, for the use and benefit of all persons interested in the estate, in the penal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) conditioned as follows:

If the undersigned [executor] [executrix] (or [administrator] [administratrix]) shall well and faithfully account for his administration of the estate, as required by law, this bond shall become void. Otherwise, this bond will remain in full force and effect.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, as Principal.

\_\_\_\_\_, as Surety.

\_\_\_\_\_, as Surety.

Approved this date: \_\_\_\_\_, \_\_\_\_.



\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

Approved this date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Judge.

**Reporter’s Notes to Form 6:** *See Ark. Code Ann. § 28-48-204.* The references to administrator and administratrix in parentheses are to be substituted for the references to executor and executrix if the personal representative was not nomi-

nated in the decedent’s will. If a corporate surety is used, the power of attorney of agent should be attached. If the sureties are individuals, their qualifying affidavit (Form 7) should be attached.

**Form 7.**

[Caption]

**QUALIFYING AFFIDAVIT OF PERSONAL SURETIES**

The undersigned, being the sureties on the bond filed in this estate, state on oath that we collectively own property in the State of Arkansas, in excess of our liabilities and subject to execution, of a value equal to the amount of the bond.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Surety.

\_\_\_\_\_, Surety.

\_\_\_\_\_, Surety.

[Affidavit]

**Reporter’s Notes to Form 7:** *See Ark. Code Ann. § 28-48-205.* This form is only for individual sureties. It may be used

with the guardian’s bond (Form 27). An affidavit is required by Ark. Code Ann. § 28-48-205(b).

**Form 8.**

[Caption]

**ACCEPTANCE OF APPOINTMENT AS PERSONAL REPRESENTATIVE**

The undersigned, \_\_\_\_\_, having been appointed \_\_\_\_\_ of the estate of \_\_\_\_\_, deceased, accepts the appointment.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature]

**Reporter's Notes to Form 8:** See Ark. Code Ann. § 28-48-102(a). This form is to be used only when no bond is required of the personal representative.

## Form 9.

[Caption]

### DESIGNATION OF PROCESS AGENT

The undersigned, \_\_\_\_\_, as \_\_\_\_\_ of the estate of \_\_\_\_\_, appoints the clerk of this court and his successors in office, (or \_\_\_\_\_, whose residence address is \_\_\_\_\_,) as agent in behalf of the undersigned, to accept service of process and notice in all actions and proceedings with respect to the estate.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature]

**Reporter's Notes to Form 9:** See Ark. Code Ann. § 28-48-101(b)(6). This form is for use by a nonresident personal representative or guardian. The language in parentheses should be substituted for the language immediately preceding it if someone other than the clerk of the court is appointed. The statute does not require an affidavit or acknowledgment.

## Form 10.

[Caption]

### LETTERS OF ADMINISTRATION

\_\_\_\_\_, whose address is \_\_\_\_\_, having been appointed and qualified as [administrator] [administratrix] of the estate of \_\_\_\_\_, deceased, who died on or about [date], is hereby authorized to act as [administrator] [administratrix] for and in behalf of the estate and to take possession of the estate's property as authorized by law.

Issued this date: \_\_\_\_\_, \_\_\_\_.



\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter’s Notes to Form 10:** See Ark. Code Ann. § 28-48-102. This form shall used if the personal representative was not nominated in the decedent’s will. Appropriate modifications should be made to this form for letters of administration with will annexed, administration in succession, and special administration.

**Form 11.**

[Caption]

LETTERS TESTAMENTARY

\_\_\_\_\_, whose address is \_\_\_\_\_, having been appointed and qualified as [executor] [executrix] of the will of \_\_\_\_\_, deceased, who died on or about [date], is hereby authorized to act as [executor] [executrix] for and in behalf of the estate and to take possession of the estate’s property as authorized by law.

Issued this date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter’s Notes to Form 11:** See Ark. Code Ann. § 28-48-102. This form shall used if the personal representative was nominated in the decedent’s will.

**Form 12.**

[Caption]

NOTICE OF APPOINTMENT AS [ADMINISTRATOR] [ADMINISTRATRIX]

Last known address: \_\_\_\_\_

Date of Death: \_\_\_\_\_, \_\_\_\_

The undersigned was appointed [administrator] [administratrix] of the estate of \_\_\_\_\_, deceased, on [date].

All persons having claims against the estate must exhibit them, duly verified, to the undersigned within three (3) months from the date of the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate. However, claims for injury or death caused by the negligence of the decedent shall be filed within six (6) months from the date of the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate.

This notice first published on [date].

\_\_\_\_\_  
[Administrator] [Administratrix]

\_\_\_\_\_  
[Mailing Address]

**Reporter's Notes to Form 12:** See Ark. Code Ann. § 28-40-111. This form shall used if no will was admitted to probate.

### Form 13.

[Caption]

NOTICE OF APPOINTMENT AS [EXECUTOR] [EXECUTRIX] (OR  
[ADMINISTRATOR] [ADMINISTRATRIX] WITH WILL ANNEXED)

Last known address: \_\_\_\_\_

Date of Death: \_\_\_\_\_, \_\_\_\_\_

An instrument dated \_\_\_\_\_, \_\_\_\_ was admitted to probate on [date] as the last will of \_\_\_\_\_, deceased, and the undersigned has been appointed [executor] [executrix] (or [administrator] [administratrix]) thereunder. Contest of the probate of the will can be effected only by filing a petition within the time provided by law.

All persons having claims against the estate must exhibit them, duly verified, to the undersigned within three (3) months from the date of the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate. However, claims for injury or death caused by the negligence of the decedent shall be filed within six (6) months from the date of the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate.

This notice first published on [date].

\_\_\_\_\_  
[Executor] [Executrix] [Administrator]



[Administratrix]

---

[Mailing Address]

**Reporter’s Notes to Form 13:** See Ark. Code Ann. § 28-40-111. This form shall be used if a will was admitted to probate and a personal representative was appointed. The language in parentheses in the first paragraph should be substituted for the language immediately preceding it if the personal representative

was not nominated in the decedent’s will. The form to be used when a will is probated but no personal representative appointed may be found in Ark. Code Ann. § 28-40-111(c)(3). Because such proceedings are infrequent, no official form was adopted.

**Form 14.**

[Caption]

**NOTICE TO SURVIVING SPOUSE**

The will of the \_\_\_\_\_, deceased, dated \_\_\_\_\_, \_\_\_\_, was admitted to probate by this court on [date].

Any right which you may have to take against the will must be exercised by written election filed in this court within one month after the expiration of the time limited for the filing of claims against the estate; except, however, that in the particular circumstances set forth in Ark. Code Ann. § 28-39-403, you may be entitled to make such election at a later date.

Dated: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter’s Notes to Form 14:** See Ark. Code Ann. § 28-39-402. This notice must be mailed by the clerk to the surviv-

ing spouse of the decedent within one month after a will has been admitted to probate.

**Form 15.**

[Caption]

**REQUEST FOR SPECIAL NOTICE OF HEARING**

The undersigned, \_\_\_\_\_, respectfully requests written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, by rule of court, or by an order in this case.

My address is \_\_\_\_\_.

My interest in the estate is that of \_\_\_\_\_.

My attorney, authorized to represent me in this proceeding, and to accept notice for me, is \_\_\_\_\_, whose address is \_\_\_\_\_.

Dated: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature]

### PROOF OF SERVICE

1. (To be used if acknowledged by personal representative or his attorney)

The undersigned acknowledges receipt of this notice on [date].

\_\_\_\_\_  
[Personal Representative]

By: \_\_\_\_\_

[Attorney]

(To be used when not so acknowledged)

The undersigned duly served this notice on \_\_\_\_\_, the personal representative of this estate, on [date] in the following manner: [Insert the method of service as specified in Ark. Code Ann. § 28-1-112.]

[Affidavit]

**Reporter's Notes to Form 15:** See Ark. Code Ann. § 28-40-108(b). This form is to be used only after a personal representative has been appointed and must be prepared in duplicate, with one copy

served on the personal representative. An affidavit is required only if Paragraph 2 is used and must be sworn to unless signed by an officer authorized by law to serve civil process, or signed by the clerk or by



an attorney of this state. See Ark. Code  
Ann. § 28-1-112(f).

**Form 16.**

[Caption]

**PETITION FOR AWARD OF STATUTORY ALLOWANCES**

The decedent, \_\_\_\_\_, is survived by the  
persons named below who constitute the surviving spouse, if any, and  
all of the decedent’s minor children, if any.

Name of surviving spouse: \_\_\_\_\_.

Children:

Name of Child	Sex	Age	Name of Guardian
_____	_____	_____	_____
_____	_____	_____	_____

The surviving spouse, who was living with the decedent at the time of  
the decedent’s death, is entitled to the award of the following items of  
household furniture, furnishings, appliances, implements and equip-  
ment which are reasonably necessary for the use and occupancy of the  
family dwelling by the surviving spouse and minor children, if any:

**HOUSEHOLD FURNITURE AND EQUIPMENT**

[Itemizing is required only to the extent necessary to distinguish the  
selected items from other household furniture and equipment, if any, of  
the decedent’s estate.]

Among the items of personal property of the estate of the decedent are  
those described below, which the undersigned surviving spouse of the  
decedent (or the undersigned guardian of the decedent’s minor chil-  
dren) have selected to be assigned to and vested in the surviving spouse  
and minor children of the decedent as provided by law. Each item of  
property has the value stated opposite its description.

**ITEMIZED DESCRIPTION OF PROPERTY**

Description	Value
_____	\$ _____
_____	\$ _____
_____	\$ _____

The surviving spouse and minor children of the decedent are entitled to be awarded sustenance for a period of two months after the death of the decedent as follows:

THEREFORE, petitioner requests that this court enter an order assigning to and vesting in the surviving spouse and minor children of the decedent the personal property described above, to which they are respectively entitled under the provisions of Ark. Code Ann. §§ 28-39-101 through 28-39-104.

---

[Capacity of Petitioner]

[Affidavit]

**Reporter's Notes to Form 16:** See Ark. Code Ann. §§ 28-39-101 — 28-39-104. The total value under "Itemized Description of Property" is limited to \$1,000 as against creditors and \$2,000 as against distributees. If minor children are not the children of the surviving spouse, the petition should be revised to reflect that the allowance vests in the surviving spouse to the extent of one-half thereof, and the remainder vests in the decedent's minor children in equal shares. Award for suste-

nance for period of two months after death of decedent shall be a reasonable amount, not exceeding \$500 in the aggregate. Ark. Code Ann. § 28-39-101(c). Beneath the signature line, the capacity of the petitioner should be identified (e.g., as the personal representative, the surviving spouse, or the guardian of minor children). If the petitioner is the guardian of minor children, the language in parentheses should be substituted for the language immediately preceding it.

## Form 17.

[Caption]

### INVENTORY OF DECEDENT'S ESTATE

The undersigned, \_\_\_\_\_ of the estate of \_\_\_\_\_, deceased, states on oath that to the best of my knowledge and belief, the following is a complete and accurate inventory of all property owned by the decedent, and its fair market value, at the time of the decedent's death.

#### REAL ESTATE

Legal Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
Homestead: _____	_____	\$ _____
Other real estate: _____	_____	\$ _____

Total Value of Real Estate: \$ \_\_\_\_\_



PERSONAL PROPERTY

Household Goods and Personal Effects

[This list should include, but not be limited to, furniture, household and yard equipment, clothing, jewelry, etc.]

Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Other Tangible Personal Property

[This list should include, but not be limited to, automobiles and other motor vehicles, farm equipment, livestock, agricultural products, stocks of merchandise, any going business enterprise or interest therein, etc.]

Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Intangible Personal Property

[List separately in detail: cash on hand; money on deposit, stating names and addresses of depositories; bonds, stating names of issuers, interest rates, classes, maturity dates, serial numbers, face amounts, and dates to which interest is paid; corporate stocks, stating certificate numbers, names of issuers, classes, and number of shares; notes receivable, stating the names and addresses of makers, dates, amounts, interest rates, and dates to which interest paid, balances due, maturities, and security, if any; accounts receivable, stating names of debtors, dates of last items and balances due; and other intangibles, describing in detail.]

Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Total Value of Personal Property: \$ \_\_\_\_\_

## SUMMARY

Total real property: \$ \_\_\_\_\_

Total personal property: \$ \_\_\_\_\_

Total estate: \$ \_\_\_\_\_

The undersigned was not indebted or obligated to the decedent at the time of the decedent's death except as stated herein.

Date: \_\_\_\_\_, \_\_\_\_.

---

 [Signature]

[Affidavit]

**Reporter's Notes to Form 17:** See Ark. Code Ann. § 28-49-110. This form should be filed by the personal representative within two months after qualification, unless the requirement is waived pursuant to Ark. Code Ann. § 28-49-110(c)(1). Inventory should not include any property owned jointly with right of

survivorship by the decedent and a third party, or any insurance proceeds or other benefits payable by beneficiary designation, unless such benefits are payable to the decedent's estate. An affidavit is required by Ark. Code Ann. § 28-49-110(a)(2).

**Form 18.**

[Caption]

## AFFIDAVIT TO CLAIM AGAINST ESTATE

I, \_\_\_\_\_, do swear that the attached claim against the estate of \_\_\_\_\_, deceased, is correct, that nothing has been paid or delivered toward the satisfaction of the claim except as noted, that there are no offsets to this claim, to the knowledge of this affiant, except as therein stated, and that the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) is now justly due (or will or may become due as stated). I further state that if this claim is based upon a written instrument, a true and complete copy, including all endorsements, is attached.

Date: \_\_\_\_\_, \_\_\_\_.

---

 [Signature]



[Affidavit]

**Reporter's Notes to Form 18:** *See* Ark. Code Ann. §§ 28-50-103 — 28-50-104. If this affidavit is made by a corporation, organization, or anyone other than an individual in his or her own behalf, the representative capacity of the affiant must be clearly stated in the first line in the form and below the signature line. An affidavit is required by Ark. Code Ann. § 28-50-103(a).

**Form 19.**

[Caption]

**APPRAISAL**

The undersigned, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, having been appointed to appraise the property described below, represented to us by \_\_\_\_\_ as \_\_\_\_\_ to be property of the captioned estate, do appraise the value of each item as:

**REAL ESTATE**

Legal Description of Property and Interest Therein Owned by the Estate	Value
_____	\$ _____
_____	\$ _____

Total Value: \$ \_\_\_\_\_

Each of the undersigned states on oath that [he] [she] is not interested in the estate, the property appraised, or the sale of any of this property; that [he] [she] believes [himself] [herself] to be well informed concerning the value of the property appraised; and that the foregoing appraisal is on the basis of the full and fair value of the property.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_

[Appraiser]

\_\_\_\_\_

[Appraiser]

\_\_\_\_\_

[Appraiser]

[Affidavit]

**Reporter's Notes to Form 19:** See Ark. Code Ann. § 28-51-302. This form is to be used by personal representatives and guardians of estates when real estate of the decedent or ward is to be sold, and in sales of personal property when an appraisal is required by the court. The

court may approve the appointment of one appraiser instead of the three contemplated by the form to appraise real property, unless an heir or beneficiary of the estate objects. By statute, the appraisers must certify the appraisal under oath. Ark. Code Ann. § 28-51-302(b).

## Form 20.

[Caption]

### ACCOUNTING BY PERSONAL REPRESENTATIVE

\_\_\_\_\_ respectfully submits to the court [his] [her] account as \_\_\_\_\_ of this estate for the period beginning on [date] and ending on [date]. This account is submitted because [insert the occasion for filing of account as set forth in Ark. Code Ann. § 28-52-103(a)].

1. Charges to accountant: [If this is the first account, the first item should be the value of the estate as reflected by the inventory. If a subsequent account, the first item should be the balance shown by the previous account. Thereafter list separately, described in detail: (a) additional property received by accountant; (b) all income; and (c) gains from the sale, conveyance or other disposition of any property received by the accountant during the accounting period. Show the date of each transaction.]

Total Charges to Accountant: \$ \_\_\_\_\_

2. Credits, other than payments to distributees, to which accountant is entitled: [List separately (a) all disbursements, other than payments to distributees, and (b) all losses sustained on sales, conveyances or other dispositions of any property, describing each item in full. Show the date of each transaction.]

Total: \$ \_\_\_\_\_

3. Credits for money paid or assets delivered to distributees: [Itemize each disbursement of cash and describe in detail other assets delivered, showing opposite each asset the amount at which its value was estimated in the inventory or, if purchased by the accountant, its cost. Show the date of each transaction.]

Total: \$ \_\_\_\_\_

### SUMMARY OF ACCOUNT

Charges to accountant: \$ \_\_\_\_\_



Credits as per paragraph 2: \$ \_\_\_\_\_

Credits as per paragraph 3: \$ \_\_\_\_\_

Total Credits: \$ \_\_\_\_\_

Balance remaining in hands of accountant: \$ \_\_\_\_\_

4. Description of balance remaining in hands of accountant: [List separately and describe in detail each item of property remaining in the accountant's hands, showing the inventory value or cost of each.]

5. Changes in form of assets not affecting balance: [List separately and describe in detail all changes in the form of assets resulting from collections or sales at inventory or cost value and other such transactions. Show the date of each transaction.]

6. All outstanding liabilities of the estate of which accountant has knowledge are:

Total Liabilities: \$ \_\_\_\_\_

Vouchers evidencing cash disbursements and receipts evidencing other assets delivered for which accountant has taken credit are attached to this account.

THEREFORE, having fully accounted for the administration of this estate for the period set out above, accountant requests that, after proper advertisement and notice, if any, required by law or by the court, this account be examined, approved, and confirmed by the court, and that accountant be allowed the sum of \$ \_\_\_\_\_ as [his] [her] fee for services rendered during the period covered by this account.

\_\_\_\_\_  
[Signature]

[Affidavit]

**Reporter's Notes to Form 20:** See Ark. Code Ann. §§ 28-52-103 — 28-52-104. In the case of a final account, a request for an order of final distribution should be added, pursuant to Ark. Code Ann. § 28-52-105(b). This form should be

filed by the personal representative unless the requirement is waived pursuant to Ark. Code Ann. § 28-52-104(c). Verification of the account is required by Ark. Code Ann. § 28-52-103(a). Form 31 is to be used for an accounting by a guardian.

**Form 21.**

[Caption]

## NOTICE OF FILING OF ACCOUNTS

Pursuant to Ark. Code Ann. § 28-52-106, notice is given that accounts of the administration of the estates listed below have been filed on the dates shown by the named personal representatives.

All interested persons are called on to file objections to such accounts on or before the sixtieth day following the filing of the respective accounts, failing which they will be barred forever from excepting to the account.

Name of Estate	Name and Address of Personal Representa- tive	Nature of Account	Date Filed
_____	_____	_____	_____
_____	_____	_____	_____

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter's Notes to Form 21:** By statute, the clerk must publish, in a newspaper published or having a general circulation in the county, a notice of estates in which accounts have been filed by personal representatives during the preceding month, listing in alphabetical order the names of the estates. Ark. Code Ann. § 28-52-106.

**Form 22.**

[Caption]

## CITATION FOR FAILURE TO PRESENT ACCOUNT

To \_\_\_\_\_, the personal representative of this estate:

Being delinquent in the filing of your account of your administration of this estate, you are required to file that account within thirty (30) days after the date of service of this citation and to show cause why an attachment should not be issued against you for your failure to present your account according to law.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.



By: \_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter’s Notes to Form 22:** See  
Ark. Code Ann. § 28-52-103(c).

**Form 23.**

[Caption]

**AFFIDAVIT FOR COLLECTION OF SMALL ESTATE BY DISTRIBUTEE**

\_\_\_\_\_, \_\_\_\_\_  
and \_\_\_\_\_, for the purpose of dispensing  
with administration of this estate, deceased, state on oath:

- 1. The decedent \_\_\_\_\_, aged \_\_\_\_\_, who  
resided at \_\_\_\_\_ in \_\_\_\_\_  
County, Arkansas, died at \_\_\_\_\_ on or about [date]. No  
petition for the appointment of a personal representative for the  
decedent’s estate is pending or has been granted.
- 2. More than forty-five (45) days have elapsed since decedent’s death.
- 3. The value, less encumbrances, of all property owned by the decedent  
at the time of death, excluding the homestead of and statutory allow-  
ances for the benefit of the surviving spouse or minor children, if any, of  
the decedent, does not exceed one hundred thousand dollars (\$100,000).
- 4. There are no unpaid claims or demands against the decedent or the  
decedent’s estate, and the Department of Human Services furnished no  
federal or state benefits to the decedent (or, that if such benefits have  
been furnished, the Department of Human Services has been reim-  
bursed in accordance with state and federal laws and regulations).
- 5. An itemized description and valuation of the decedent’s personal  
property; a legal description and valuation of the decedent’s real  
property, including homestead, if any; and the names and addresses of  
persons having possession thereof or residing on any of the decedent’s  
real property, are:

Description of Property, and Ex- tent and Details of Encum- brances, if Any	Valuation Less Encumbrances	In Possession of
_____	_____	_____
_____	_____	_____

6. The names, ages, relationships to the decedent and residence addresses of the persons entitled to receive the property of the decedent as surviving spouse, heirs or devisees of decedent's will are:

Name	Age	Relationship	Residence Address
_____	_____	_____	_____
_____	_____	_____	_____

THEREFORE, the distributee[s] of this estate shall be entitled to distribution of the property identified above, without the necessity of an order of the court or other proceeding, upon furnishing a copy of this Affidavit, certified by the clerk, to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right of the decedent.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Affiant]

\_\_\_\_\_  
[Affiant]

\_\_\_\_\_  
[Affiant]

[Affidavit]

CERTIFICATE OF CLERK

The undersigned Clerk of the Probate Court of \_\_\_\_\_ County, Arkansas, certifies that this is a true copy of an affidavit filed in this court on [date], that the affidavit remains on file and that no petition for the appointment of a personal representative of this estate has been filed in this court.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

(Seal)



**Reporter's Notes to Form 23:** See Ark. Code Ann. § 28-41-101. The language in parentheses in Paragraph 4 should be substituted for the language immediately preceding it if the Department of Human Services furnished benefits to the decedent. An affidavit by the distributee is required by Ark. Code Ann.

§ 28-41-101(a)(4). If an estate collected pursuant to this affidavit contains real property, the distributee, to allow for presentation of claims against the estate, may publish a notice promptly after the affidavit has been filed. Ark. Code Ann. § 28-41-101(b)(2).

**Form 24.**

[Caption]

**PETITION FOR APPOINTMENT OF GUARDIAN OF THE PERSON AND ESTATE**

The petitioner respectfully represents to this court that a guardian of the person and of the estate should be appointed for the incapacitated person whose name, date of birth, sex, and address are:

Name	Date of Birth	Sex	Residence Address
_____	_____	_____	_____

The nature of the incapacity and purpose of the guardianship sought for the incapacitated person are: [Insert the nature of incapacity and purpose of guardianship, in accordance with the definitions and classifications set forth in Ark. Code Ann. §§ 28-65-101 & 28-65-104.]

The nature, extent and value of the property of the incapacitated person and the interest of the incapacitated person in that property, are: [Include approximate value and description of property, including any compensation, pension, insurance or allowance to which the incapacitated person may be entitled].

There is no guardian of the person or estate of the incapacitated person, except as follows: [State whether a guardian has been appointed in any state for the estate or person of the incapacitated person and if not, write "none."]

\_\_\_\_\_, whose address is \_\_\_\_\_, is related to or interested in the incapacitated person by reason of \_\_\_\_\_ and is legally qualified to serve as guardian of the person and estate of the incapacitated person.

[He] [She] is at present serving as guardian of the persons or estates of the incapacitated persons whose names and addresses are as follows: [List the names and addresses of any wards for whom the person whose appointment is sought is already guardian.]

Insofar as the petitioner has been able to ascertain, the persons most closely related, by blood or marriage, to the incapacitated person are:

Name	Relation- ship	Residence Address
_____	_____	_____
_____	_____	_____

The nature of the proposed ward's alleged disability is: [Set forth a statement of the alleged disability as defined by Ark. Code Ann. §§ 28-65-101(1) & 28-65-104.]

Petitioner recommends the following type of guardianship, having the scope and duration indicated: [Include a recommendation proposing the type, scope and duration of guardianship.]

The following facility or agency from which the proposed ward is receiving services has been notified of the proceedings: [Include a statement that any facility or agency from which the respondent is receiving services has been notified of the proceedings.]

The names and addresses of others having knowledge of the proposed ward's disability are:

Name	Residence Address
_____	_____
_____	_____
_____	_____

[Signature of Petitioner]

[Affidavit]

**Reporter's Notes to Form 24:** This petition is for a guardianship of both the person and the estate. It should be modified if the guardianship is only of one or the other. By statute, incapacitated persons include those who are impaired by certain specified mental and physical disabilities, as well as persons under the age of 18 whose disabilities have not been removed and persons who are detained or confined by a foreign power or who have disappeared. Ark. Code Ann. §§ 28-65-101 & 28-65-104. Matters that must be enumerated in the petition are set forth in Ark. Code Ann. § 28-65-205. *See also* Ark. Code Ann. §§ 28-65-105 — 28-65-106 (purpose of guardianship proceedings and rights of incapacitated persons).

**Form 25.**

[Caption]



NOTICE OF HEARING FOR APPOINTMENT

To: \_\_\_\_\_

You are hereby notified that a petition has been filed in this court for the appointment of a guardian of the [person] [estate] [person and estate] of \_\_\_\_\_, an incapacitated person, and that the petition will be heard at \_\_\_\_ o'clock \_\_\_\_m., on [date] at the \_\_\_\_\_ County Courthouse, or at a later time or other place to which the hearing may be adjourned or transferred.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

**Reporter's Notes to Form 25:** See Ark. Code Ann. § 28-65-207 (notice of hearing for appointment and methods for service of such notice); Ark. Code Ann. § 28-65-208 (persons who must be notified of the hearing). At least 20 days notice of the hearing must be given. Ark. Code Ann. § 28-65-207(c)(2).

Form 26.

[Caption]

APPLICATION FOR WRITTEN NOTICE

To: \_\_\_\_\_

The undersigned, \_\_\_\_\_, in accordance with Ark. Code Ann. § 28-65-209, requests written notice of all hearings on petitions for settlement of accounts, for the sale, mortgage, lease, or exchange of any property of this guardianship estate, for an allowance of any nature payable from the ward's estate, for the investment of funds of the estate, for the removal, suspension, or discharge of the guardian, or for final termination of the guardianship, and any other matter affecting the welfare or care of the incapacitated person or [his] [her] property.

The requested notice should be sent to the undersigned at the following address:

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Applicant or attorney]

\_\_\_\_\_  
[Mailing Address]

**Reporter's Notes to Form 26:** Pursuant to Ark. Code Ann. § 28-65-209, an interested party may, in person or by attorney, serve upon the guardian and upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or

proof of service, a written request stating that he desires notice of some or all of the matters enumerated in this form. Unless the court directs otherwise, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he designates in his request.

## Form 27.

[Caption]

### GUARDIAN'S BOND

The undersigned, \_\_\_\_\_, as principal, having been appointed guardian of the [person] [estate] [person and estate] of \_\_\_\_\_, an incapacitated person; and \_\_\_\_\_, as suret \_\_\_\_\_, acknowledge themselves to be jointly and severally obligated to the State of Arkansas, for the use and benefit of all persons interested, in the penal sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_), conditioned as follows:

If the undersigned guardian shall well and faithfully account for his guardianship, as by law required, this bond shall become void; otherwise, it will remain in full force and effect.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, as Principal.

\_\_\_\_\_, as Surety.

\_\_\_\_\_, as Surety.

Approved this date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

By: \_\_\_\_\_, Deputy Clerk.

Approved this date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Judge.

**Reporter's Notes to Form 27:** See Ark. Code Ann. § 28-65-215 (requirement

for a bond). For the qualifying affidavit of personal sureties, see Form 7.

## Form 28.

[Caption]



ACCEPTANCE OF APPOINTMENT AS GUARDIAN

The undersigned, \_\_\_\_\_, having been appointed guardian of the [person] [estate] [person and estate] of \_\_\_\_\_, an incapacitated person, hereby accepts the appointment.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Signature]

**Reporter’s Notes to Form 28:** This form is to be used only when no bond is required of the guardian.

**Form 29.**

[Caption]

LETTERS OF GUARDIANSHIP OF THE PERSON AND ESTATE

Be It Known:

\_\_\_\_\_, whose address is \_\_\_\_\_, having been appointed guardian of the person and estate of \_\_\_\_\_, an incapacitated person, and having qualified as guardian, is hereby authorized to have the care and custody of and exercise control over the incapacitated person and to take possession of and administer the property of the incapacitated person, as authorized by law.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_, Clerk.

\_\_\_\_\_, Deputy Clerk.

(Seal)

**Reporter’s Notes to Form 29:** This form, prescribed by Ark. Code Ann. § 28-65-217, is for a guardianship of both the person and the estate. It should be modified if the guardianship is only of one or the other. If the powers, authorities, and duties of the guardian are limited, the

letters of guardianship must clearly state, in bold print, that they are so restricted and the word “limited” must appear in both the title and in the body of the form. For designation of a process agent by a non-resident, see Form 9.

**Form 30.**

[Caption]

**INVENTORY OF WARD'S ESTATE**

The undersigned, guardian of the estate of \_\_\_\_\_, an incapacitated person, states on oath that to the best of my knowledge and belief, the following is a complete and accurate inventory of all property owned by the ward at the time of my appointment as such guardian, and that the amount set opposite each item of property is its fair market value at the time it came under my control as guardian:

**REAL ESTATE**

Legal Description and Extent of Ward's In- terest	Encumbrances, Liens, Etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Total value of real estate: \$ \_\_\_\_\_

**PERSONAL PROPERTY****Household Goods and Personal Effects**

[This list should include, but not be limited to, furniture, household and yard equipment, clothing, jewelry, etc.]

Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

**Other Tangible Personal Property**

[This list should include, but not be limited to, automobiles and other motor vehicles, farm equipment, livestock, agricultural products, stocks of merchandise, any going business enterprise or interest therein, etc.]



Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Intangible Personal Property

[List separately in detail: cash on hand; money on deposit, stating names and addresses of depositories; bonds, stating names of issuers, interest rates, classes, maturity dates, serial numbers, face amounts, and dates to which interest is paid; corporate stocks, stating certificate numbers, names of issuers, classes, and number of shares; notes receivable, stating the names and addresses of makers, dates, amounts, interest rates, and dates to which interest paid, balances due, maturities, and security, if any; accounts receivable, stating names of debtors, dates of last items and balances due; and other intangibles, describing in detail.]

Description	Encumbrances, Liens, etc., and Net Value	Respective Amounts Thereof
_____	_____	\$ _____
_____	_____	\$ _____

Total value of personal property: \$ \_\_\_\_\_

SUMMARY

Total real property: \$ \_\_\_\_\_

Total personal property: \$ \_\_\_\_\_

Total estate: \$ \_\_\_\_\_

The undersigned is not indebted or obligated to the ward except as stated herein.

Date: \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_

[Signature]

[Affidavit]

**Reporter's Notes to Form 30:** Paragraph (a) of Ark. Code Ann. § 28-65-321 provides that the inventory is subject to the same requirements for the inventory of a decedent's estate. *See* Ark. Code Ann. § 28-49-110. Among those requirements is an affidavit.

### Form 31.

[Caption]

## ACCOUNTING BY GUARDIAN

\_\_\_\_\_ respectfully submits to the court  
[his] [her] account as guardian of the estate of  
\_\_\_\_\_ for the period beginning on [date]  
and ending on [date]. This account is submitted because [insert the  
occasion for filing of account as set forth in Ark. Code Ann. § 28-65-  
320].

1. Charges to accountant: [If this is the first account, the first item should be the value of the estate as reflected by the inventory. If a subsequent account, the first item should be the balance shown on the previous account. Thereafter list separately and describe in detail (a) additional property received by accountant; (b) all income; and (c) gains from the sale, conveyance or other disposition of any property received by the accountant during the accounting period. Show the date of each transaction.]

Total charges to accountant: \$ \_\_\_\_\_

2. Credits, other than payments to distributees, to which accountant is entitled: [List separately (a) all disbursements, other than payments to distributees, and (b) all losses sustained on sales, conveyances or other dispositions of any property, describing each item in full. Show the date of each transaction.]

Total: \$ \_\_\_\_\_

3. Credits for money paid or assets delivered to distributees: [Itemize each disbursement of cash and describe in detail other assets delivered, showing opposite each asset the amount at which its value was estimated in the inventory or, if purchased by the accountant, its cost. Show the date of each transaction.]

Total: \$ \_\_\_\_\_

## SUMMARY OF ACCOUNT

Charges to accountant: \$ \_\_\_\_\_



Credits as per paragraph 2: \$ \_\_\_\_\_

Credits as per paragraph 3: \$ \_\_\_\_\_

Total Credits: \$ \_\_\_\_\_

Balance remaining in hands of accountant: \$ \_\_\_\_\_

4. Description of balance remaining in hands of accountant: [List separately and describe in detail each item of property remaining in the accountant's hands, showing the inventory value or cost of each.]

5. Changes in form of assets not affecting balance: [List separately and describe in detail all changes in the form of assets resulting from collections or sales at inventory or cost value and other such transactions. Show the date of each transaction.]

6. All outstanding liabilities of the estate of which accountant has knowledge are:

Total Liabilities: \$ \_\_\_\_\_

Vouchers evidencing cash disbursements and receipts evidencing other assets delivered for which accountant has taken credit are attached to this account.

THEREFORE, having fully accounted for the administration of this estate for the period set out above, accountant requests that, after proper advertisement and notice, if any, required by the law or by the court, this account be examined, approved, and confirmed by the court, and that accountant be allowed the sum of \$ \_\_\_\_\_ as [his] [her] fee for services rendered during the period covered by this account.

---

[Signature]

[Affidavit]

**Reporter's Notes to Form 31:** Pursuant to Ark. Code Ann. § 28-65-320, a guardian of the estate must file with the court annually, within 60 days after the anniversary date of his or her appointment and also within 60 days after termination of his or her guardianship, a written verified accounting. Notice of hearing

of every accounting must be given to the same persons in the same manner as required in connection with the petition to appoint the guardian, except that the court may dispense with notice to a mentally incompetent ward upon a satisfactory showing that such notice would be detrimental to his or her well-being.

**Form 32.**

[Caption]

**ANNUAL REPORT OF GUARDIAN**

\_\_\_\_\_, the duly appointed, qualified, and acting guardian of \_\_\_\_\_, an incapacitated person, submits this annual report to the court in accordance with Ark. Code Ann. § 28-65-322.

The current mental, physical, and social condition of the incapacitated person is: [Provide a summary.]

The present living arrangements of the incapacitated person are: [Describe those arrangements.]

The need for continued guardianship services is: [State whether there is a need for such services.]

Submitted with this annual report is the petitioner's accounting of the guardianship estate for the period beginning on [date] and ending on [date].

\_\_\_\_\_  
[Signature]

**Reporter's Notes to Form 32:** All guardians must file an annual report with the court, setting forth the matters reflected in this form. *See* Ark. Code Ann.

§ 28-65-322. Any other information which is requested by the court or is necessary in the opinion of the guardian must also be included.

**Form 33.**

[Caption]

**AGREEMENT OF DEPOSITORY**

The undersigned, being [a bank in Arkansas insured by the Federal Deposit Insurance Corporation] [a savings and loan association in Arkansas insured by the Federal Savings & Loan Association Corporation] [a credit union in Arkansas insured by the National Credit Union Administration], received on deposit from \_\_\_\_\_, as guardian of the estate of \_\_\_\_\_, an incapacitated person, the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) in cash on [date] and agrees not to permit any withdrawal from these funds unless authorized by order of this court.



Date: \_\_\_\_\_, \_\_\_\_.

---

[Authorized Officer or Agent of Depository]

**Reporter's Notes to Form 33:** By statute, the court may dispense with a bond for the guardian when the entire guardianship is in cash deposited on interest in any of the institutions identified in the form, provided that the value of the estate so deposited is not greater than the maximum amount of insurance provided by law for a single depositor. Ark. Code Ann. § 28-65-215(e). This form must be executed on behalf of the depository and filed with the probate clerk. For an enumeration of the types of authorized investments for guardianship funds, *see* Ark. Code Ann. § 28-65-311."





# Index to Title 28

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## A

### **ABANDONED PROPERTY.**

#### **Decedents' estates.**

##### **Assets.**

Lost and abandoned property,  
§28-49-106.

### **ABATEMENT, REVIVAL AND SURVIVAL OF ACTIONS.**

#### **Decedents' estates.**

##### **Claims.**

Revivor equivalent to filing of claim,  
§28-50-102.

Distribution, §28-53-107.

### **ABORTION.**

#### **Decedents' estates.**

##### **Deceased viable fetus.**

Jurisdiction over estate, §28-1-118.

#### **Guardians.**

Decisions requiring court approval,  
§28-65-302.

### **ACCOUNTANTS.**

#### **Guardians.**

Employment of professionals by  
guardian, §28-65-319.

### **ACCOUNTINGS BY FIDUCIARIES.**

#### **Banks.**

Common trust funds, §28-69-202.

#### **Common trust funds, §28-69-202.**

#### **Veterans' guardianship act,**

§28-66-110.

Certificate of examination of securities  
or investments, §28-66-110.

Copies sent to department of  
veterans affairs, §28-66-110.

##### **Copies.**

Certificate of examination of  
securities or investments,  
§28-66-110.

Failure to account or furnish copies,  
§28-66-111.

Penalties, §28-66-111.

Discharge of guardian upon final  
accounting, §28-66-117.

Notice of hearing on account,  
§28-66-110.

Property derived from other sources,  
§28-66-110.

Release of sureties upon final  
accounting, §28-66-117.

## **ACKNOWLEDGMENTS.**

### **Decedents' estates.**

Designation of heirs.

Declaration, §28-8-102.

### **Heirs.**

Designation of heirs.

Declaration, §28-8-102.

## **ACTIONS.**

### **Estate tax apportionment.**

Action for declaratory judgment on  
enforcement of provisions,  
§28-54-111.

### **Guardians.**

Actions by ward against guardian.

Venue, §28-65-109.

Prosecution of, §28-65-305.

### **Power of attorney.**

Authority granted under power  
regarding claims and litigation,  
§28-68-212.

### **Trusts and trustees.**

Enforcement and defense of claims of  
trust, §28-73-811.

## **ADEMPTION.**

### **Wills.**

Sale of ward's property.

Not an ademption, §28-24-102.

## **ADOPTION.**

### **Wills.**

Taking against will.

Rights of subsequently adopted  
children, §28-39-407.

## **ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION, §§28-74-101 to**

28-74-505.

### **Application of provisions.**

Foreign country treated as state,  
§28-74-103.

Uniform application, §28-74-501.

### **Best evidence rule, applicability,**

§28-74-106.

### **Communication between courts,**

§28-74-104.

### **Cooperation between courts,**

§28-74-105.

### **Definitions, §28-74-102.**

### **Deposition of witness from another state, §28-74-106.**

## **ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION —Cont'd**

**Effective date of provisions,**  
§28-74-505.

**Electronic signatures in global and national commerce, relation to,**  
§28-74-502.

### **Evidence.**

Best evidence rule, applicability,  
§28-74-106.

**Foreign country treated as state,**  
§28-74-103.

### **Jurisdictional provisions.**

Appropriate forum determination,  
§28-74-206.

Declination of jurisdiction by court,  
§28-74-206.

Reason of conduct, §28-74-207.

Definitions, §28-74-201.

Exclusive and continuing jurisdiction,  
§28-74-205.

Exclusive basis for jurisdiction provided by act, §28-74-202.

Generally, when court has jurisdiction,  
§28-74-203.

Multiple states, proceedings in,  
§28-74-209.

Notice of petition, §28-74-208.

Significant connections, determining,  
§28-74-201.

Special jurisdiction, §28-74-204.

Unjustifiable conduct.

Declination of jurisdiction for,  
§28-74-207.

When court has jurisdiction generally,  
§28-74-203.

**Multiple states, proceedings in,**  
§28-74-209.

**Notice of petition,** §28-74-208.

**Registration of guardianship orders,**  
§28-74-401.

Effect of registration, §28-74-403.

**Registration of protective orders,**  
§28-74-402.

Effect of registration, §28-74-403.

**Title of chapter,** §28-74-101.

**Transfer of guardianship or conservatorship to another state,** §28-74-301.

Acceptance by court, §28-74-302.

**Transitional provisions,** §28-74-504.

**Uniform application and construction of provisions,**  
§28-74-501.

### **Witnesses.**

Deposition of witness from another state, §28-74-106.

## **ADULT MALTREATMENT.**

### **Conservatorship of adult.**

Jurisdiction over proceedings,  
§28-67-102.

### **Guardianship of adult.**

Jurisdiction over proceedings,  
§28-65-107.

Conservators, §28-67-102.

Uniform adult guardianship and protective proceedings jurisdiction act, §§28-74-101 to 28-74-505.

**Uniform adult guardianship and protective proceedings jurisdiction act,** §§28-74-101 to 28-74-505.

## **ADVANCEMENTS.**

### **Descent and distribution.**

Determination of advancements,  
§28-53-109.

Partial distribution, §28-53-102.

**Intestate succession,** §28-9-216.

## **AFFIDAVITS.**

### **Decedents' estates.**

Dispensing with administration.

Effect of affidavit, §28-41-102.

Fees, §28-41-101.

Filing, §28-41-101.

### **Wills.**

Attesting witnesses, §28-25-106.

Use as evidence in probate,  
§28-25-106.

## **AFRICAN DEVELOPMENT BANK.**

### **Fiduciaries.**

Obligations deemed legal investments,  
§28-69-205.

## **AFTERBORN CHILDREN.**

### **Wills.**

Taking against will.

Rights of subsequently born children, §28-39-407.

## **AGE.**

### **Wills.**

Who may make wills, §28-25-101.

Who may witness, §28-25-102.

## **AGENTS.**

### **Fiduciaries.**

Definition of fiduciary to include agent, §28-69-201.

### **Power of attorney.**

Acceptance of appointment,  
§28-68-113.

Breach of fiduciary duty by another agent.

Liability for failure to notify principal, §28-68-111.



**AGENTS —Cont'd****Power of attorney —Cont'd**

- Certification, form, §28-68-302.
- Coagents, §28-68-111.
- Compensation and reimbursement, §28-68-112.
- Court review of agent's conduct, petition for, §28-68-116.
- Duties upon appointment, §28-68-114.
- Liability for violations, §28-68-117.
- Relief of agent from liability, agreement providing for, §28-68-115.
- Resignation, §28-68-118.
- Standards agent held to, §28-68-114.
- Successor agents, §28-68-111.
- Termination of agent's authority, §28-68-110.

**Trustees.**

- Delegation to agent.
- Arkansas trust code, §28-73-807.

**ALIENS.****Dower and curtesy.**

- Surviving spouse of alien.
- Entitled to dower or curtesy, §28-11-202.

**Intestate succession, §28-9-211.****ANIMALS.****Trusts and trustees.**

- Arkansas trust code.
- Trust for care of animals, §28-73-408.

**ANNUITIES.****Uniform principal and income act.**

- Receipts normally apportioned, §28-70-409.

**ANTE-MORTEM PROBATE ACT.****Wills.**

- Probate of wills, §§28-40-201 to 28-40-203.

**ANTI-LAPSE ACT.****Wills, §28-26-104.****APPEALS.****Decedents' estates.**

- Escheated estates.
- Review of proceedings, §28-13-111.

**Probate proceedings.**

- Appeal from circuit court, §28-1-116.

**APPORTIONMENT.****Estate tax.**

- Generally, §§28-54-101 to 28-54-115.

**APPRAISALS AND APPRAISERS.****Costs.**

- Decedents' estates.
- Homesteads.
- Contest of commissioner's report, §28-39-205.

**Decedents' estates.**

- Homesteads.
- Appointment of commissioners, §28-39-203.
- Contest of commissioner's report, §28-39-205.
- Costs, §28-39-205.
- Notice, §28-39-205.
- Oath of commissioners, §28-39-203.
- Report of commissioners, §28-39-203.
- Return of commissioners, §28-39-203.
- Sale, mortgage, lease or exchange of property.
- Appraisal of real property, §28-51-302.

**Notice.**

- Decedents' estates.
- Homesteads.
- Contest of commissioner's report, §28-39-205.

**Oaths.**

- Decedents' estates.
- Homesteads.
- Oath of commissioners, §28-39-203.

**ARKANSAS TRUST CODE,**

§§28-73-101 to 28-73-1106.

**ARTIFICIAL INSEMINATION.****Intestate succession.**

- Status of child for intestate succession purposes, §28-9-209.
- Time for ascertainment of rights to inheritance or succession, §28-9-209.

**ASIAN DEVELOPMENT BANK.****Fiduciaries.**

- Obligations deemed legal investments, §28-69-205.

**ASSETS.****Decedents' estates, §§28-49-101 to 28-49-117.****Executors and administrators.**

- Ancillary administration.
- Removal of assets to domiciliary jurisdiction, §28-42-106.

**ASSETS —Cont'd****Executors and administrators**

—Cont'd

Ancillary administration —Cont'd

Transfer of residue to domiciliary  
personal representative,  
§28-42-109.**ASSIGNMENTS.****Curtesy.**Assignment of dower and curtesy,  
§§28-39-301 to 28-39-309.**Decedents' estates.**Dower and curtesy, §§28-39-301 to  
28-39-309.**Dower and curtesy**, §§28-39-301 to  
28-39-309.**ATTACHMENT.****Trusts and trustees.**

Arkansas trust code.

Creditors or assignees of  
beneficiaries, rights of,  
§28-73-501.**ATTESTATION.****Wills.**

Probate of wills, §28-40-117.

**ATTORNEYS AT LAW.****Executors and administrators.**Employment of attorneys, §28-48-108.  
Fees, §28-48-108.**Guardian ad litem.**Appointment power of court,  
§28-1-111.**Guardians.**Employment of legal counsel,  
§28-65-319.**Power of attorney.**Opinion of counsel, reliance on as to  
acceptance of power, §28-68-119.**ATTORNEYS' FEES.****Decedents' estates.**Executors and administrators,  
§28-48-109.

Personal representatives, §28-48-108.

**Executors and administrators.**Employment of legal counsel,  
§28-48-108.**Trusts and trustees.**Administration of trust, judicial  
proceedings involving,  
§28-73-1004.**AUCTIONS AND AUCTIONEERS.****Decedents' estates.**

Escheated estates.

Sale of real property, §28-13-109.  
Notice, §28-13-109.**AUCTIONS AND AUCTIONEERS**

—Cont'd

**Decedents' estates —Cont'd**

Escheated estates —Cont'd

Sale of real property —Cont'd  
Time, §28-13-109.

Real property.

Sales at public auction, §28-51-304.

**Notice.**

Decedents' estates.

Escheated estates.

Sale of real estate, §28-13-109.

**AUDITS AND AUDITORS.****Decedents' estates.**

Accounts and accounting.

Reference of account to auditor,  
§28-52-108.**AUTOPSIES.****Decedents' estates.**

Autopsy records of deceased.

Release by healthcare provider to  
authorized persons, nonliability  
for, §28-1-119.**B****BANKRUPTCY AND INSOLVENCY.****Executors and administrators.**

Ancillary administration.

Payment of claims.

In case of insolvency, §28-42-108.

**BANKS AND FINANCIAL  
INSTITUTIONS.****Accounts.**

Fiduciaries.

Common trust funds, §28-69-202.

**Affiliates.**

Fiduciaries.

Services provided by affiliates,  
§28-69-207.**Bond issues.**

World bank obligations.

Deemed legal investments for  
fiduciaries, §28-69-205.**Decedents' estates.**

Assets.

Bank deposits, §28-49-116.

**Deposits.**Investments kept separate from assets  
of bank, §28-69-203.**Fiduciaries.**

African development bank.

Obligations deemed legal  
investments, §28-69-205.

Asian development bank.

Obligations deemed legal  
investments, §28-69-205.



**BANKS AND FINANCIAL****INSTITUTIONS —Cont'd****Fiduciaries —Cont'd**

Common trust funds, §28-69-202.

Accounting for investments,  
§28-69-202.

Investments by bank acting as  
fiduciary, §28-69-202.

**Deposits.**

In commercial department of bank,  
§28-69-206.

Collateral pledged for uninsured  
portion of deposit, §28-69-206.

Investments kept separate from  
assets of bank, §28-69-203.

Liability for loss by acts of nominee,  
§28-69-203.

Records to show ownership of  
investments, §28-69-203.

Registration of investments,  
§28-69-204.

Trust funds, §28-69-101.

Agreement with surety,  
§28-69-101.

Approval of court, §28-69-101.

Registration of investments in  
name of nominee, §28-69-203.

**Inter-American development bank.**

Obligations deemed legal  
investments, §28-69-205.

**International bank for reconstruction  
and development.**

Obligations deemed legal  
investments, §28-69-205.

**Prudent man rule for investments.**

Legislative intent, §28-71-107.

Limited relaxation of rule.

Legislative intent, §28-71-107.

Private venture capital projects.

Limitations, §28-71-107.

Promulgation of rules and  
regulations, §28-71-107.

Rules and regulations.

Promulgation, §28-71-107.

**Registration of investments.**

In name of nominee, §28-69-203.

Liability of corporation or agent,  
§28-69-204.

Services provided by affiliates,  
§28-69-207.

**Transfer of investments.**

Liability of corporation or agent  
making transfer, §28-69-204.

**World bank obligations.**

Deemed legal investments for  
fiduciaries, §28-69-205.

**BANKS AND FINANCIAL****INSTITUTIONS —Cont'd****International bank for****reconstruction and development.****Fiduciaries.**

Obligations deemed legal  
investments, §28-69-205.

**Investments.****Fiduciaries.**

World bank obligations.

Deemed legal investments,  
§28-69-205.

**Powers.**

Obligations deemed legal investments,  
§28-69-205.

**Powers of attorney.**

Authority granted under power,  
§28-68-208.

**Trusts and trustees.**

Deposit of funds in commercial  
department of bank, §28-69-206.

Services provided by affiliates,  
§28-69-207.

**World bank bonds.**

Deemed legal investments for  
fiduciaries, §28-69-205.

**BEST EVIDENCE RULE.****Adult guardianship and protective  
proceedings jurisdiction.**

Best evidence rule applicability,  
§28-74-106.

**BLIND AND VISUALLY IMPAIRED.****Powers of attorney.**

Durable powers of attorney,  
§§28-69-101 to 28-69-203.

**BOND ISSUES.****Banks.**

World bank obligations.

Deemed legal investments for  
fiduciaries, §28-69-205.

**Dower and curtesy, §28-11-306.****BONDS, SURETY.****Conservators for elderly and  
individuals with disabilities,**

§28-67-107.

**Decedents' estates.**

Order to sell, mortgage or lease  
property.

Refusal if bond given, §28-51-103.

Personal representatives, §28-48-206.

**Missing persons.**

Administration of estates.

Trusts and trustees, §28-72-104.

**Trusts and trustees.**

Arkansas trust code, §28-73-702.

**BONDS, SURETY —Cont'd****Veterans' guardianship act,**  
§28-66-109.

Applicability of provisions, §28-66-123.

Release of sureties upon final  
accounting, §28-66-117.**BUILDINGS AND CONSTRUCTION.****Dower and curtesy.**

Assignment of dower and curtesy.

Inclusion of dwelling in assignment,  
§28-39-304.**BURDEN OF PROOF.****Guardians.**

Appointment of guardians.

Proof required, §28-65-210.

**Wills.**

Lost or destroyed wills, §28-40-302.

**C****CHARITABLE TRUSTS.****Amendments.**

Fiduciaries.

Amendment of trust instrument by  
operation of law, §§28-72-301,  
28-72-302.**Arkansas trust code.**Trusts and trustees generally,  
§§28-73-101 to 28-73-1106.**Creation, §28-73-405.****Definitions.**

Fiduciaries.

Amendment of trust instrument by  
operation of law.

"The code," §28-72-301.

**Fiduciaries.**Amendment of trust instrument by  
operation of law, §28-72-302.

Definitions, §28-72-301.

**CHILDREN AND MINORS.****Afterborn or adopted children,**

§28-39-407.

**Decedents' estates.**

Allowances, §28-39-101.

Advancements, §28-39-105.

Dower and curtesy.

Assignment of dower and curtesy,  
§§28-39-301, 28-39-303.

Escheated estates.

Reclaiming real property.

Time limits.

Exception for infants,  
§28-13-110.

Homestead exemptions.

General provisions, §§28-39-201 to  
28-39-207.**CHILDREN AND MINORS —Cont'd****Disclaimer of property interests,**  
§28-2-216.**Guardians.**

Dower and curtesy.

Assignment of dower and curtesy.

Minor heirs acting by guardian,  
§28-39-301.

Wills.

Preferences in appointment of  
guardian for minor.Request in parent's will,  
§28-65-204.**Homestead exemptions.**Decedents' estates, §§28-39-201 to  
28-39-207.**Intestate succession.**

Illegitimate children, §28-9-209.

Legitimate children.

Time for ascertainment of right of  
inheritance or succession,  
§28-9-209.**Long-term intergenerational****security trusts, §§28-72-501 to**  
28-72-507.**Pretermitted children, §28-39-407.****Trusts and trustees.**Long-term intergenerational security  
trusts, §§28-72-501 to 28-72-507.**Veterans' guardianship act.**

Certificate of majority, §28-66-117.

Guardians for minors.

Certificate of necessity, §28-66-106.

**Wills.**Failure of testamentary provisions,  
§28-26-104.

Taking against will.

Rights of children or issue.

Pretermitted children, §28-39-407.

**CHILDREN BORN OUT OF****WEDLOCK.****Intestate succession.**

Effect of illegitimacy, §28-9-209.

Presumption of legitimacy, §28-9-209.

**Presumption of legitimacy, §28-9-209.****CIRCUIT COURTS.****Guardian ad litem.**Appointment power of court,  
§28-1-111.**Jurisdiction.**

Guardianship proceedings, §28-65-107.

Probate proceedings, §28-1-104.

**Orders.**

Probate proceedings.

Modification of orders, §28-1-115.

**Probate proceedings.**

Appeals, §28-1-116.



**CIRCUIT COURTS —Cont'd****Probate proceedings —Cont'd**

Clerks, §28-1-106.

Dower and curtesy.

Allotment to surviving spouse,  
§28-39-303.

Homestead.

Petition to reserve homestead,  
§28-39-202.

Jurisdiction, §28-1-104.

Modification or vacation of orders,  
§28-1-115.

Notice.

Waiver of notice, §28-1-113.

Referees, §28-1-106.

Verified petitions.

Applications to court by verified  
petition, §28-1-109.

Objections to petition, §28-1-110.

**Referees in probate, §28-1-106.****CIVIL PROCEDURE.****Veterans' guardianship act.**

Applicable provisions, §28-66-122.

**CLAIMS.****Decedents' estates.**General provisions, §§28-50-101 to  
28-50-114.Reimbursement for nursing care,  
§28-13-103.**Executors and administrators.**

Ancillary administration.

Payment of claims, §28-42-107.

In case of insolvency, §28-42-108.

**Guardians.**

Claims against estate.

Personal liability of guardian,  
§28-65-317.

Settlement, §28-65-318.

**CODICILS.****Construction of "will" to include  
codicil, §28-1-102.****COMMODITIES.****Power of attorney.**

General authority granted, §28-68-207.

**COMMON LAW.****Intestate succession.**Doctrine of first purchaser abolished,  
§28-9-218.Male not preferred over female,  
§28-9-208.**Trusts and trustees.**

Arkansas trust code.

Supplemental nature of common  
law, §28-73-106.**COMMUNITY PROPERTY.****Decedents' estates.**Disposition of community property,  
§§28-12-101 to 28-12-113.**CONFLICT OF LAWS.****Decedents' estates.**Disposition of community property.  
Repeal of conflicting laws,  
§28-12-113.**Guardians.**

Applicability of provisions, §28-65-103.

**Power of attorney.**Financial institutions and other  
entities, laws applicable to,  
§28-68-122.**Trusts and trustees.**Testamentary additions to trusts.  
Savings clause, §28-27-105.**Wills.**Testamentary additions to trusts.  
Savings clause, §28-27-105.**CONSANGUINITY.****Intestate succession.**Computing degrees of consanguinity,  
§28-9-212.**CONSERVATORS.****Elderly and individuals with  
disabilities.**

Appointment, §28-67-105.

Ineligible persons, §28-67-106.

Petition for appointment,  
§28-67-103.

Bonds, surety, §28-67-107.

Compensation, §28-67-110.

Provided by law for guardians,  
§28-67-110.

Construction and interpretation.

Cumulative nature of provisions,  
§28-67-101.Cumulative nature of provisions,  
§28-67-101.

Discharge, §28-67-109.

Duties, §28-67-108.

Guardians.

Subsequent appointment of  
guardian, §28-67-111.

Hearings.

Appointment of conservator.

Petition for appointment,  
§28-67-103.

Notice, §28-67-104.

Jurisdiction, §28-67-102.

Management of estate, §28-67-107.

Notice, §28-67-104.

Discharge of conservator,  
§28-67-109.

**CONSERVATORS —Cont'd****Elderly and individuals with disabilities —Cont'd****Notice —Cont'd**

Hearings, §28-67-104.

Persons ineligible as conservator,  
§28-67-106.**Petitions.**Appointment of conservator,  
§28-67-103.**Hearings.**Appointment of conservator,  
§28-67-103.

Powers, §28-67-108.

Subsequent appointment of guardian,  
§28-67-111.**Fiduciaries, §§28-69-101 to 28-69-305.****Guardians, §§28-65-101 to 28-65-604.****Powers of attorney.**

Authority granted under power.

Conservatorships, guardianships or  
custodianships, §28-68-211.**CONTINUANCES.****Decedents' estates.**

Accounts and accounting.

Continuance of account, §28-52-107.

**CONTRACTS.****Decedents' estates.**

Assets.

Performance of decedent's contracts  
of sale, §28-49-114.**Guardians.**Contracts for sale of property prior to  
incapacity.

Execution by guardian, §28-65-306.

**Principal and income act generally,**  
§§28-70-101 to 28-70-606.**Simultaneous death.**Simultaneous death provisions  
inapplicable.When will or contract provides  
otherwise, §28-10-206.**Trusts and trustees.**Liability of trustee, §§28-73-1010,  
28-73-1011.**Public trusts.**Binding contract between state  
beneficiary and trustee,  
§28-72-202.**Wills.**Contracts concerning succession,  
§28-24-101.Devise of property subject to contract  
to convey, §28-24-101.**CONVERSION.****Decedents' estates.**

Assets, §28-49-102.

Property embezzled or converted,  
§28-49-105.**CONVEYANCES.****Dower and curtesy.**Consent of spouse required,  
§28-11-201.Conveyance to spouse or in trust for  
spouse in lieu of, §28-11-401.**COPIES.****Penalties.**

Veterans' guardianship act.

Failure to account or furnish copies,  
§28-66-111.**Veterans' guardianship act.**Failure to account or furnish copies,  
§28-66-111.

Penalties, §28-66-111.

Records.

Furnished without charge,  
§28-66-116.**CORPORATIONS.****Guardians.**

Foreign guardians.

Corporate guardians, §28-65-603.

**CORPUS AND INCOME OF TRUSTS,**

§§28-70-101 to 28-70-606.

**COSTS.****Appraisals and appraisers.**

Decedents' estates.

Homesteads.

Contest of commissioner's report,  
§28-39-205.**Decedents' estates.**

Escheated estates.

Surplus paid into state treasury.

Proceedings against administrator  
for failure to pay, §28-13-104.

Homesteads.

Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

Vesting of homestead, §28-39-203.

**Dower and curtesy.**

Assignment of dower and curtesy.

Costs of allotment, §28-39-303.

**Trusts and trustees.**

Administration of trust.

Judicial proceedings involving  
administration, §28-73-1004.



**COUNTIES.****Wills.**

Recording in other counties,  
§28-40-123.

**COUNTY TREASURERS.****Decedents' estates.**

Escheated estates.

Accounts and accounting,  
§28-13-112.

Writ for seizure of real estate.

Deposit with treasurers,  
§28-13-108.

**CRIMINAL LAW AND PROCEDURE.****Decedents' estates.**

Homesteads.

Disturbance of possession,  
§28-39-207.

**Dower and curtesy.**

Murder of spouse.

Effect on dower or curtesy,  
§28-11-204.

**Guardians.**

Oil, gas and mineral interests.

Sale, lease, etc.

Failure to report, §28-65-315.

Real property.

Transactions on behalf of ward.

Failure to report, §28-65-315.

**Oil and gas.**

Guardians.

Lease, sale, etc.

Failure to report, §28-65-315.

**CROPS.****Dower and curtesy.**

Assignment of dower and curtesy.

Surviving spouses bequest of  
growing crops, §28-39-308.

**CURATORS.****Fiduciaries.**

Definition of fiduciary to include  
curator, §28-69-201.

**CUSTODIAL TRUST**, §§28-72-401 to  
28-72-422.

**CY PRES**, §28-73-413.

**Amendment of trust instrument by  
operation of law**, §28-72-302.

Definitions, §28-72-301.

**D****DAMAGES.****Dower and curtesy.**

Assignment of dower and curtesy.

Recovery of dower or curtesy lands  
deforced from surviving spouse  
possession, §28-39-309.

**DAMAGES —Cont'd****Real property.**

Dower and curtesy.

Assignment of dower and curtesy.

Recovery of dower or curtesy lands  
deforced from surviving  
spouse possession, §28-39-309.

**Trusts and trustees.**

Breach of trust, §28-73-1002.

**DEATH.****Executors and administrators,**

§28-48-106.

**Security registration.**

Transfer on death registration,  
§§28-14-101 to 28-14-112.

**Simultaneous death act**, §§28-10-201  
to 28-10-212.

**DEBTOR AND CREDITORS.****Decedents' estates.**

Disposition of community property.

Creditor's rights, §28-12-107.

**Executors and administrators.**

Notice to creditor of appointment,  
§28-40-111.

**DEBTS.****Dower and curtesy.**

Accounts and evidences of debt,  
§28-11-306.

**Intestate succession.**

Debts to decedent, §28-9-217.

**DECEDENTS' ESTATES.****Abandonment.**

Assets of abandoned property,  
§28-49-106.

**Abatement, revival and survival of  
actions.**

Claims.

Revivor equivalent to filing of claim,  
§28-50-102.

Distribution, §28-53-107.

**Abortions.**

Deceased viable fetus.

Jurisdiction over estate, §28-1-118.

**Accounts and accounting.**

Account to include petition for  
settlement and distribution,  
§28-52-105.

Audits.

Reference of account to auditor,  
§28-52-108.

Citation of personal representatives,  
§28-52-103.

Conclusiveness of order settling  
account, §28-52-109.

Continuance of account, §28-52-107.

**DECEDENTS' ESTATES —Cont'd**  
**Accounts and accounting —Cont'd**

Distribution.

Account not approved.

Order, §28-53-106.

Account to include petition for  
settlement and distribution,  
§28-52-105.Petition for settlement and  
distribution.

Account to include, §28-52-105.

Duty to close estate, §28-52-102.

Escheated estates.

Executors and administrators.

Accounting by administrator when  
no known heirs, §28-13-104.

Executors and administrators.

Citation of personal representatives,  
§28-52-103.

Duty to close estate, §28-52-102.

Escheated estates.

Accounting by administrator when  
no known heirs, §28-13-104.Filing account for personal  
representative.

Who may file, §28-52-103.

Liability, §28-52-101.

Public administrators.

Accounting to regular personal  
representative, §28-48-304.

Inventory, §28-48-302.

Supplemental accounts, §28-52-110.

When personal representative must  
account, §28-52-103.

Filing of accounts.

For personal representatives.

Who may file, §28-52-103.

Notice, §28-52-106.

Form of accounts, §28-52-104.

Liability.

Executors and administrators,  
§28-52-101.

Notice.

Filing of accounts, §28-52-106.

Objections to account, §28-52-107.

Official probate forms, Probate Law  
Appx (Title 28).

Orders.

Conclusiveness of order settling  
account, §28-52-109.Petition for settlement and  
distribution.

Account to include, §28-52-105.

Reference of account to auditor,  
§28-52-108.

Supplemental account, §28-52-110.

Approval, §28-52-110.

Waiver, §28-52-104.

**DECEDENTS' ESTATES —Cont'd**  
**Accounts and accounting —Cont'd**

When required, §28-52-103.

**Acknowledgments.**

Designation of heirs.

Declaration, §28-8-102.

**Actions.**Commencement of separate action,  
§28-50-102.**Administration.**Accounts and accounting, §§28-52-101  
to 28-52-110.Ancillary administration, §§28-42-101  
to 28-42-111.

Dispensing with administration.

Affidavits, §28-41-101.

Effect, §28-41-102.

Filing, §28-41-101.

Authorized, §28-41-101.

Collection of small estates by  
distributees, §28-41-101.

Fees, §28-41-101.

Filing affidavit of distributee,  
§28-41-101.Orders for no administration,  
§28-41-103.Proceedings to revoke order,  
§28-41-104.Petition for no administration,  
§28-41-103.Executors and administrators  
generally, §§28-48-101 to  
28-48-305.**Affidavits.**Dispensing with administration,  
§§28-41-101, 28-41-102.**Allowances.**

Minors, §28-39-101.

Advancements, §28-39-105.

Official probate forms, Probate Law  
Appx (Title 28).

Surviving spouses, §28-39-101.

Rent.

Allowance paid surviving spouse  
out of rent until  
apportionment of dower or  
curtesy, §28-39-104.Freedom from rent, §§28-39-102,  
28-39-103.Right to live in house for two  
months, §28-39-102.

Extension of right, §28-39-103.

Sustenance, §28-39-102.

**Ancillary administration, §§28-42-101  
to 28-42-111.****Appeals.**

Escheated estates.

Review of proceedings, §28-13-111.



**DECEDENTS' ESTATES —Cont'd****Apportionment.**

Claims, §28-50-113.

**Assets.**

Abandonment of property, §28-49-106.

Bank deposits, §28-49-116.

Borrowing money.

Power to borrow, §28-49-113.

Compromise, §28-49-104.

Continuance of business, §28-49-112.

Contracts of sale.

Performance, §28-49-114.

Conversion, §§28-49-102, 28-49-105.

Personalty treated as realty,  
§28-49-102.

Deposits.

Bank deposits, §28-49-116.

Discovery of assets, §28-49-103.

Procedure, §28-49-103.

Disposition of mortgaged property,  
§28-49-108.

Disposition of property not paid for,  
§28-49-107.

Embezzlement, §28-49-105.

Fraudulent conveyances, §28-49-109.

Inventory, §§28-49-110, 28-49-111.

Investment of funds, §28-49-115.

Joint tax returns.

Authority to execute, §28-49-117.

Mortgages and deeds of trust.

Conversion.

Realty mortgaged as personalty,  
§28-49-102.

Disposition of mortgaged property,  
§28-49-108.

Possession of mortgaged property,  
§28-49-101.

Performance of decedent's contracts of  
sale, §28-49-114.

Possession, §28-49-101.

Power to borrow money, §28-49-113.

Property not paid for.

Disposition, §28-49-107.

Taxation.

Execution of joint tax returns,  
§28-49-117.

**Assignments.**

Dower and curtesy, §§28-39-301 to  
28-39-309.

**Attorney's fees, §28-48-108.****Auctions and auctioneers.**

Escheated estates.

Sale of real property, §28-13-109.

Notice, §28-13-109.

Time, §28-13-109.

Real property.

Sales at public auction, §28-51-304.

**DECEDENTS' ESTATES —Cont'd**  
**Audits.**

Accounts and accounting.

Reference of account to auditor,  
§28-52-108.

**Autopsy records of deceased.**

Release by healthcare provider to  
authorized persons, nonliability  
for, §28-1-119.

**Banks.**

Assets.

Bank deposits, §28-49-116.

**Bonds, surety, §28-48-206.**

Order to sell, mortgage or lease  
property.

Refusal if bond given, §28-51-103.

**Claims.**

Abatement, revival and survival of  
actions.

Revivor equivalent to filing of claim,  
§28-50-102.

Actions.

Commencement of separate action,  
§28-50-102.

Allowance of claims, §28-50-105.

Apportionment, §28-50-113.

Claims not due, §28-50-108.

Secured claims, §28-50-109.

Classification, §28-50-106.

Compromise of claims, §28-50-112.

Contingent claims, §28-50-110.

Limitation of actions, §28-50-110.

Payment.

By distributees, §28-50-111.

Contribution, §28-50-111.

Execution prohibited, §28-50-114.

Executors and administrators,  
§28-50-107.

Filing, §28-50-104.

Contingent claims, §28-50-110.

Limitations, §28-50-101.

Secured claims, §28-50-109.

Forms, §28-50-103.

Official probate forms, Probate Law  
Appx (Title 28).

Levies prohibited, §28-50-114.

Liens not affected, §28-50-101.

Limitation of actions.

Contingent claims, §28-50-110.

Filing, §28-50-101.

Limitation on filing, §28-50-101.

Notice to creditors.

Appointment of personal  
representative, §28-40-111.

Nursing care reimbursement,  
§28-13-103.

Court findings and order,  
§28-13-103.

**DECEDENTS' ESTATES —Cont'd****Claims —Cont'd**

Nursing care reimbursement —Cont'd

Escheat, §28-13-103.

Orders, §28-13-103.

Procedure, §28-13-103.

Orders.

Nursing care reimbursement,  
§28-13-103.

Payment, §§28-50-106, 28-50-113.

Presentation, §28-50-104.

Secured claims, §28-50-109.

Small claims, §28-50-105.

Social services.

Reimbursement for nursing care,  
§28-13-103.

Statute of nonclaim, §28-50-101.

Verification, §28-50-103.

**Community property.**

Uniform disposition of community  
property rights at death act,  
§§28-12-101 to 28-12-113.

**Compromise and settlement.**

Accounts and accounting.

Petition for settlement and  
distribution.

Account to include, §28-52-105.

Assets, §28-49-104.

Claims, §28-50-112.

**Conflict of laws.**

Disposition of community property.

Repeal of conflicting laws,  
§28-12-113.

**Construction and interpretation.**

Disposition of community property.

Uniformity of construction,  
§28-12-110.

**Continuances.**

Accounts and accounting.

Continuance of account, §28-52-107.

**Contracts.**

Assets.

Performance of decedent's contracts  
of sale, §28-49-114.

**Contribution.**

Claims, §28-50-111.

Distribution, §28-53-108.

Exoneration of encumbered  
property, §28-53-113.

**Conversion.**

Assets, §28-49-102.

Property embezzled or converted,  
§28-49-105.

**Costs.**

Escheated estates.

Surplus paid into county treasury.

Proceedings against administrator  
for failure to pay, §28-13-104.

**DECEDENTS' ESTATES —Cont'd****Costs —Cont'd**

Homesteads.

Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

Vesting of homestead, §28-39-203.

**County treasurers.**

Escheated estates.

Accounts and accounting,  
§28-13-112.

Writ for seizure of real estate.

Deposit with treasurers,  
§28-13-108.

**Creditors.**

Uniform disposition of community  
property rights at death act,  
§§28-12-101 to 28-12-113.

**Curtsey.**

Assignment, §§28-39-301 to 28-39-309.

**Deceased viable fetus.**

Jurisdiction over estate, §28-1-118.

**Deeds.**

Escheated estates.

Sale of real property, §28-13-109.

**Deposits.**

Assets.

Bank deposits, §28-49-116.

**Disclaimer of property interests,**

§§28-2-201 to 28-2-221.

**Dispensing with administration,**

§§28-41-101 to 28-41-104.

**Disposition of community property.**

Acts of married persons, §28-12-108.

Applicability of provisions, §28-12-101.

Uniformity of applications,  
§28-12-110.

Citation of chapter, §28-12-111.

Conflict of laws.

Repeal of laws in conflict with  
provisions, §28-12-113.

Construction and interpretation.

Uniformity of construction,  
§28-12-110.

Creditor's rights, §28-12-107.

Devisees.

Perfection of title, §28-12-105.

Disposition upon death, §28-12-103.

Dower and curtesy.

No estate exists, §28-12-103.

Effective date of provisions,  
§28-12-112.

Executors and administrators.

Perfection of title, §28-12-105.

Heirs.

Perfection of title, §28-12-105.

Limitations on testamentary  
disposition, §28-12-109.



**DECEDENTS' ESTATES —Cont'd****Disposition of community property —Cont'd**

Perfection of title.

Heirs or devisees, §28-12-105.

Personal representatives,  
§28-12-105.

Surviving spouses, §28-12-104.

Presumptions.

Rebuttable presumptions,  
§28-12-102.Purchaser for value or lender,  
§28-12-106.

Rebuttable presumptions, §28-12-102.

Scope of provisions, §28-12-101.

Security interests.

Purchasers for value or lenders,  
§28-12-106.

Short title, §28-12-111.

Surviving spouses.

Perfection of title, §28-12-104.

Title of chapter, §28-12-111.

Uniformity of application and  
construction, §28-12-110.

Wills.

Limitations on testamentary  
disposition, §28-12-109.**Documents.**

Real property.

Sale, mortgage, lease or exchange.

Title documents, §28-51-307.

**Dower and curtesy.**

Assignment, §§28-39-301 to 28-39-309.

**Embezzlement.**

Assets, §28-49-105.

**Escheat.**

Descent and distribution.

Provisions not to repeal law of  
escheats, §28-53-117.**Escheated estates.**

Accounts and accounting.

Executors and administrators,  
§28-13-104.

Appeals.

Review of proceedings, §28-13-111.

Applicability of provisions, §28-13-101.

Auctions and auctioneers.

Sale of real property, §28-13-109.

Notice, §28-13-109.

Time, §28-13-109.

Certificates of surplus, §28-13-104.

Costs.

Judgment against county,  
§28-13-107.

Judgment for county, §28-13-107.

Proceedings against administrators.

Failure to pay surplus into state  
treasury, §28-13-104.**DECEDENTS' ESTATES —Cont'd****Escheated estates —Cont'd**

County treasurers.

Accounts and accounting.

Auditor to keep accounts,  
§28-13-112.

Writ for seizure of real estate.

Deposit with treasurers,  
§28-13-108.

Deeds.

Sale of real property, §28-13-109.

Denial of title in county.

Claimants or interested persons as  
defendants, §28-13-106.

Costs.

Judgment against county,  
§28-13-107.

Judgment for county, §28-13-107.

Defense, §28-13-106.

Failure to appear or plead,  
§28-13-107.

Forms.

Judgment for county, §28-13-107.

Judgment against county,  
§28-13-107.

Costs, §28-13-107.

Judgment by default, §28-13-107.

Judgment for state, §28-13-107.

Costs, §28-13-107.

Effect, §28-13-107.

Form, §28-13-107.

Pleadings.

Failure to plead, §28-13-107.

Time for pleading, §28-13-106.

Procedure, §28-13-106.

Scire facias, §28-13-106.

Time for pleading, §28-13-106.

Trial, §28-13-106.

Executors and administrators.

Accounts and accounting.

By administrator when no known  
heirs, §28-13-104.

Fees.

Sale of real property.

Sheriff's fees, §28-13-109.

Forms.

Judgment for county, §28-13-107.

Judgments.

Against county, §28-13-107.

Costs, §28-13-107.

For county, §28-13-107.

Costs, §28-13-107.

Form of judgment, §28-13-107.

Forms.

Judgments for county, §28-13-107.

Surplus property.

Executors and administrators.

Failure to pay into county  
treasury, §28-13-104.

**DECEDENTS' ESTATES —Cont'd****Escheated estates —Cont'd**

Lack of person capable of inheriting,  
§28-9-215.

**Minors.**

Reclaiming real property.

Excepted from time limit  
provisions, §28-13-110.

**Notice.**

Publications.

Order for appearance, §28-13-106.

**Orders.**

Payment of money, §28-13-110.

Scire facias.

Order for appearance, §28-13-106.

**Pleadings.**

Denial of title in county.

Failure to plead, §28-13-107.

Time for pleadings, §28-13-106.

**Prosecuting attorneys.**

Attendance at court, §28-13-105.

Duties, §28-13-105.

Preservation of estates,  
§28-13-105.

Examination of administration,  
§28-13-105.

Proceedings for escheat of real  
property, §28-13-106.

**Publications.**

Notice.

Order for appearance, §28-13-106.

**Real property.**

Proceedings for escheat, §28-13-106.

Prosecuting attorneys.

Proceedings for escheats,  
§28-13-106.

Reclaiming real property,  
§28-13-110.

Decrees, §28-13-110.

Examination of claim by court,  
§28-13-110.

**Minors.**

Excepted from time limit  
provisions, §28-13-110.

Petitions, §28-13-110.

Copy to prosecuting attorney,  
§28-13-110.

Proceedings, §28-13-110.

Time limit, §28-13-110.

Exception for infants,  
§28-13-110.

Failure to claim within time  
bars right, §28-13-110.

Sale of real property, §28-13-109.

Auctions, §28-13-109.

Claimants entitled to proceeds,  
§28-13-109.

Deeds, §28-13-109.

**DECEDENTS' ESTATES —Cont'd****Escheated estates —Cont'd****Real property —Cont'd****Sale of real property —Cont'd**

Disposition of proceeds,  
§28-13-109.

Fees.

Sheriff's fees, §28-13-109.

Lands escheated to state,  
§28-13-109.

Manner of sale, §28-13-109.

Notice, §28-13-109.

Place of sale, §28-13-109.

Sheriff's fees, §28-13-109.

Time, §28-13-109.

**Seizure of real estate.**

Recordation.

Return of writ, §28-13-108.

Return of writ, §28-13-108.

Deposit with county treasurer,  
§28-13-108.

Recordation, §28-13-108.

Review of proceedings, §28-13-111.

Writ for seizure, §28-13-108.

Returns, §28-13-108.

Reclaiming money paid into treasury,  
§28-13-110.

Limitation of actions, §28-13-110.

Order for repayment of money,  
§28-13-110.

Proceedings, §28-13-110.

Time limit, §28-13-110.

**Recordation.**

Writ for seizure of real property.

Return of writ, §28-13-108.

Review of proceedings, §28-13-111.

**Scire facias.**

Issuance against claimants,  
§28-13-106.

Order for appearance, §28-13-106.

Publication of notice, §28-13-106.

**Service of process.**

Scire facias, §28-13-106.

**Sheriffs.**

Sale of real property.

Fees, §28-13-109.

**Social services.**

Reimbursement for nursing care,  
§28-13-103.

**State of Arkansas.**

Estate vests in county, §28-13-102.

**Surplus property.**

Certificates of surplus, §28-13-104.

Paid into county treasury,  
§28-13-104.

Administrator credited with  
amount paid, §28-13-104.

Failure to pay, §28-13-104.



**DECEDENTS' ESTATES —Cont'd****Escheated estates —Cont'd**

## Surplus property —Cont'd

Paid into county treasury —Cont'd

Judgment on failure to pay,  
§28-13-104.Costs of proceedings,  
§28-13-104.

## Trial.

Denial of title in county, §28-13-106.

Vesting in county, §28-13-102.

When property escheats, §28-13-102.

**Estate not passing under tables of descents, §28-9-215.****Estate tax.**Apportionment, §§28-54-101 to  
28-54-115.**Executions.**

## Claims.

Execution and levies prohibited,  
§28-50-114.

## Real property.

Sale, mortgage, lease or exchange,  
§28-51-306.Sale, mortgage, lease or exchange of  
real property.Execution of conveyance or other  
instrument by personal  
representative, §28-51-306.**Executors and administrators.**Accounts and accounting, §§28-52-101  
to 28-52-110.Ancillary administration, §§28-42-101  
to 28-42-111.General provisions, §§28-48-101 to  
28-48-305.**Exoneration.**

## Distribution.

Exoneration of encumbered  
property, §28-53-113.**Fees.**

Attorney's fees, §28-48-108.

Dispensing with administration.

Affidavit of distributee, §28-41-101.

## Escheated estates.

Sale of real property.

Sheriff's fees, §28-13-109.

Personal representatives, §28-48-108.

## Real property.

Sale, mortgage, lease or exchange.

Broker's fee, §28-51-307.

**Filing of accounts.**

Waiver, §28-52-104.

**Forms.**

Accounts and accounting.

Form of accounts, §28-52-104.

Claims, §28-50-103.

**DECEDENTS' ESTATES —Cont'd****Forms —Cont'd**

## Escheated estates.

Judgment for county, §28-13-107.

Official probate forms, Probate Law  
Appx (Title 28).**Fraudulent conveyances, §28-49-109.****Funds.**

## Assets.

Investment of funds, §28-49-115.

**Heirs.**

## Designation of heirs.

Declaration, §28-8-102.

Acknowledgment, §28-8-102.

Recordation, §28-8-102.

## Disposition of community property.

Perfection of title, §28-12-105.

**Homesteads.**

## Appraisals and appraisers.

Appointment of commissioners,  
§28-39-203.

Oath of commissioners, §28-39-203.

Return of commissioners,  
§28-39-203.

## Costs.

## Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

Vesting of homestead, §28-39-203.

## Disturbance of possession, §28-39-207.

Misdemeanors, §28-39-207.

Entry of homestead reservation by  
clerk, §28-39-202.Lot constitutes homestead upon failure  
to bring sufficient sum,  
§28-39-204.

## Minors.

Petitions, §28-39-202.

Rights of surviving spouse and  
children, §28-39-201.

Selection of homestead, §28-39-204.

## Misdemeanors.

Disturbance of possession,  
§28-39-207.

## Notice.

## Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

Sale of land.

Value exceeding limit, §28-39-204.

## Oaths.

## Appraisals and appraisers.

Oath of commissioners,  
§28-39-203.

## Petitions.

By surviving spouse or child,  
§28-39-202.

Minors, §28-39-202.

**DECEDENTS' ESTATES —Cont'd****Homesteads —Cont'd**

Probate clerk.

Entry of reservation of homestead,  
§28-39-202.

Recordation.

Entry of homestead reservation by  
clerk, §28-39-202.

Sale of land.

Value exceeding limit, §28-39-204.

Notice, §28-39-204.

Selection of homestead by surviving  
spouse or children, §28-39-204.

Sheriffs.

Sale of land.

Report of sheriff, §28-39-204.

Surviving spouses.

Petitions, §28-39-202.

Rights of surviving spouses and  
children, §28-39-201.

Selection of homestead, §28-39-204.

Value exceeding limit, §28-39-204.

Disposition of surplus, §28-39-204.

Notice.

Sale of land, §28-39-204.

Report to sheriff, §28-39-204.

Sale of land, §28-39-204.

Notice, §28-39-204.

Vesting of homestead, §28-39-203.

Costs, §28-39-203.

Entry of clerk, §28-39-203.

Excess over amount exempted noted  
on record, §28-39-203.

**Husband and wife.**

Disposition of community property.

Acts of married persons.

Severing or altering interests in  
property, §28-12-108.

**Income tax.**

Surviving spouse.

Joint income tax refunds,  
§28-38-101.

**Incompetent persons.**

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.

**Interest.**

Distribution, §28-53-112.

**Inventory, §28-49-110.**

Debt of executor, §28-49-111.

Supplemental inventory, §28-49-110.

Waiver, §28-49-110.

**Investments.**

Assets.

Investment of funds, §28-49-115.

**Judgments.**

Escheated estates, §§28-13-104,  
28-13-107.

**DECEDENTS' ESTATES —Cont'd****Liability.**

Accounts and accounting.

Executors and administrators,  
§28-52-101.

**Liens.**

Sale, mortgage, lease or exchange of  
property.

Purchase by holder of lien,  
§28-51-107.

Waiver of landlord's lien, §28-51-309.

**Limitation of actions.**

Claims.

Contingent claims, §28-50-110.

Limitations on filing, §28-50-101.

**Loans.**

Assets.

Power to borrow money, §28-49-113.

**Lost and unclaimed property.**

Assets.

Abandonment of property,  
§28-49-106.

**Maps and plats.**

Real property.

Sale, mortgage, lease or exchange.

Platting and dedication,  
§28-51-308.

**Minors.**

Allowances; §28-39-101.

Advancements, §28-39-105.

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.

Dower and curtesy.

Assignment of dower and curtesy.

Defense when action against  
incompetent person,  
§28-39-303.

Minor heirs acting by guardian,  
§28-39-301.

Escheated estates.

Reclaiming real property.

Time limits.

Exception for infants,  
§28-13-110.

**Mortgages and deeds of trust.**

Assets.

Disposition of mortgaged property,  
§28-49-108.

Power to mortgage property,  
§28-49-113.

**Notice.**

Accounts and accounting.

Filing of accounts, §28-52-106.

Appointment of personal  
representatives.

Creditors of estate to be notified,  
§28-40-111.



**DECEDENTS' ESTATES —Cont'd****Notice —Cont'd**

Escheated estates.

Sale of real estate, §28-13-109.

Scire facias.

Order for appearance.

Publication of notice,  
§28-13-106.

Homesteads.

Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

Value exceeding limit.

Sale of land, §28-39-204.

**Oaths.**

Homesteads.

Appraisals and appraisers.

Oath of commissioners,  
§28-39-203.**Orders.**

Accounts and accounting.

Conclusiveness of order settling  
account, §28-52-109.

Claims.

Social services.

Reimbursement for nursing care,  
§28-13-103.

Descent and distribution.

Order of final distribution.

Conclusiveness, §28-53-105.

Contents, §28-53-104.

Hearing, §28-53-103.

Notice, §28-53-103.

Escheated estates.

Repayment of money, §28-13-110.

Scire facias.

Order for appearance, §28-13-106.

Personal property.

Sale, mortgage, lease or exchange.

Order refused if bond given,  
§28-51-103.Transfer under court order,  
§28-51-103.

Real property.

Sale, mortgage, lease or exchange,  
§28-51-303.Order refused if bond given,  
§28-51-103.Transfer under court order,  
§28-51-103.**Personal property.**

Bonds, surety.

Order to sell, mortgage or lease  
property.

Refusal if bond given, §28-51-103.

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.**DECEDENTS' ESTATES —Cont'd****Personal property —Cont'd**Disposition of community property,  
§§28-12-101 to 28-12-113.

Orders.

Sale, mortgage, lease or exchange.

Order refused if bond given,  
§28-51-103.Transfer under court order,  
§28-51-103.Performance of contracts of sale,  
§28-49-114.

Perishable property.

Sale of perishable property,  
§28-51-202.Sale, mortgage, lease or exchange,  
§28-51-201.

Bonds, surety.

Order to sell, mortgage or lease  
property.Refusal if bond given,  
§28-51-103.

Exchange of property, §28-51-108.

Executors and administrators.

Petition to require, §28-51-103.

Homestead.

Sale of homestead, §28-51-104.

Lienholders.

Purchase by holder of lien,  
§28-51-107.No priority between real and  
personal property, §28-51-101.

Perishable property, §28-51-202.

Priority between real and personal  
property.

No priority, §28-51-101.

Procedure, §28-51-201.

Terms of sale, §28-51-105.

Transfer under court order,  
§28-51-103.

Unit concept.

Conveyance of real and personal  
property as unit, §28-51-203.

Validity of proceedings, §28-51-109.

When personal representative may  
purchase, §28-51-106.

Wills.

When power given in will,  
§28-51-102.**Petitions.**

Accounts and accounting.

Petition for settlement and  
distribution.

Account to include, §28-52-105.

**Pleadings.**

Escheated estates.

Denial of title in county.

Failure to appear or plead,  
§28-13-107.

**DECEDENTS' ESTATES —Cont'd****Pleadings —Cont'd**

Escheated estates —Cont'd

Denial of title in county —Cont'd

Time for pleadings, §28-13-106.

**Presumptions.**

Disposition of community property.

Rebuttable presumptions,  
§28-12-102.**Probate clerks.**Petition for reservation of homestead,  
§28-39-202.**Prosecuting attorneys.**

Escheated estates.

Duties, §§28-13-105, 28-13-106.

**Publications.**

Escheated estates.

Scire facias.

Order for appearance, §28-13-106.

**Real property.**

Bond, surety.

Order to sell, mortgage or lease  
property.

Refusal if bond given, §28-51-103.

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.Disposition of community property,  
§§28-12-101 to 28-12-113.Escheated estates, §§28-13-101 to  
28-13-112.

Homesteads, §§28-39-201 to 28-39-207.

Maps and plats.

Sale, mortgage, lease or exchange.

Platting and dedication,  
§28-51-308.

Orders.

Sale, mortgage, lease or exchange,  
§28-51-303.Order refused if bond given,  
§28-51-103.Transfer under court order,  
§28-51-103.Performance of contracts of sale,  
§28-49-114.Sale, mortgage, lease or exchange,  
§28-51-301.Appraisals and appraisers,  
§28-51-302.

Auctions and auctioneers.

Sales at public auction,  
§28-51-304.

Bonds, surety.

Order to sell, mortgage or lease  
property.Refusal if bond given,  
§28-51-103.

Broker's fee, §28-51-307.

Confirmation, §28-51-305.

**DECEDENTS' ESTATES —Cont'd****Real property —Cont'd**Sale, mortgage, lease or exchange  
—Cont'd

Documents.

Title documents, §28-51-307.

Exchange of property, §28-51-108.

Execution by personal

representative, §28-51-306.

Executors and administrators.

Execution of conveyance or other  
instrument, §28-51-306.

Petitions to require, §28-51-103.

When personal representative  
may purchase, §28-51-106.

Fees.

Broker's fee, §28-51-307.

Homesteads.

Sale of homestead, §28-51-104.

Landlord's lien.

Waiver, §28-51-309.

Lienholders.

Purchase by holder of lien,  
§28-51-107.

Maps and plats, §28-51-308.

No priority between real and  
personal property, §28-51-101.

Orders, §28-51-303.

Refusal if bond given, §28-51-103.

Transfer under court order,  
§28-51-103.

Platting and dedication, §28-51-308.

Priority between real and personal  
property.

No priority, §28-51-101.

Proceedings, §28-51-301.

Recordation, §28-51-306.

Reports, §28-51-305.

Terms of sale, §28-51-105.

Title documents, §28-51-307.

Transfer under court order,  
§28-51-103.

Unit concept.

Conveyance of real and personal  
property as unit, §§28-51-203,  
28-51-301.

Validity of proceedings, §28-51-109.

Waiver of landlord's lien, §28-51-309.

Wills.

When power given in will,  
§28-51-102.**Recordation.**

Designation of heirs.

Declaration, §28-8-102.

Escheated estates.

Writ for seizure of real property.

Return of writ, §28-13-108.



**DECEDENTS' ESTATES —Cont'd****Recordation —Cont'd**

## Homesteads.

Entry of reservation by clerk,  
§28-39-202.

## Real property.

Sale, mortgage, lease or exchange,  
§28-51-306.

**Rent.**

## Allowances.

## Surviving spouses.

Allowance paid surviving spouse  
out of rent.

Until apportionment of dower or  
curtesy, §28-39-104.

Freedom from right, §§28-39-102,  
28-39-103.

**Renunciation.**

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.

**Reports.**

## Homesteads.

## Appraisals and appraisers.

Contest of commissioner's report,  
§28-39-205.

## Sheriffs.

Sale of land, §28-39-204.

Sale, mortgage, lease or exchange of  
real property, §28-51-305.

**Sales.**

## Homestead.

Value exceeding limit.

Sale of land, §28-39-204.

**Scire facias.**

## Escheated estates.

Issuance against claimants,  
§28-13-106.

Order for appearance, §28-13-106.

Publication of notice, §28-13-106.

Service of process, §28-13-106.

**Sheriffs.**

## Escheated estates.

Sale of real property.

Fees, §28-13-109.

## Homesteads.

Value exceeding limit.

Sale of land.

Report of sheriff, §28-39-204.

**Simultaneous death act**, §§28-10-201  
to 28-10-212.

**Small estates.**

## Claims.

Allowance of claims, §28-50-105.

Dispensing with administration,  
§§28-41-101 to 28-41-104.

**Social services.**

## Claims.

Reimbursement for nursing care,  
§28-13-103.

**DECEDENTS' ESTATES —Cont'd**  
**State of Arkansas.**

## Escheated estates.

Estate escheats to and vests in  
county, §28-13-102.

**Surplus property.**

## Escheated estates.

Certificates of surplus, §28-13-104.

Surplus paid into county treasury,  
§28-13-104.

Administrator credited with  
amount paid, §28-13-104.

Failure to pay, §28-13-104.

Judgment on failure to pay,  
§28-13-104.

Costs of proceedings,  
§28-13-104.

**Surviving spouses.**

Allowances, §§28-39-101 to 28-39-105.

Disposition of community property.

Perfection of title, §28-12-104.

## Income tax.

Joint income tax refunds,  
§28-38-101.

Survivorship abolished, §28-8-101.

**Survivorship abolished**, §28-8-101.

**Tables of descent**, §28-9-214.

**Taxation.**

## Assets.

Authority to execute joint tax  
returns, §28-49-117.

## Estate tax.

Apportionment, §§28-54-101 to  
28-54-115.

## Income tax.

## Surviving spouses.

Joint income tax refunds,  
§28-38-101.

**Time.**

## Escheated estates.

Denial of title in county.

Time for pleadings, §28-13-106.

**Title.**

## Real property.

Sale, mortgage, lease or exchange.

Title documents, §28-51-307.

**Trial.**

## Escheated estates.

Denial of title in county, §28-13-106.

**Trusts and trustees.**

## Distribution.

Applicability of provisions,  
§28-53-202.

Principal and income act, §§28-70-101  
to 28-70-606.

**Uniform laws.**

## Community property.

Disposition of community property,  
§§28-12-101 to 28-12-113.

**DECEDENTS' ESTATES —Cont'd****Waiver.**

- Bonds, surety, §28-48-206.
- Filing of formal accounting,  
§28-52-104.
- Inventory, §28-49-110.
- Landlord's lien, §28-51-309.

**Witnesses.**

- Assets.
- Continuation of business,  
§28-49-112.

**Writs.**

- Escheated estates.
- Seizure of real property, §28-13-108.

**DECLARATORY JUDGMENTS.****Estate tax apportionment.**

- Action for declaratory judgment on enforcement of provisions,  
§28-54-111.

**Wills.**

- Probate of wills.
- Ante-mortem probate act.
- Establishing validity of will,  
§28-40-202.

**DEEDS.****Decedents' estates.**

- Escheated estates.
- Sale of real property, §28-13-109.

**DEFENSES.****Trusts and trustees.**

- Enforcement and defense of claims of trust, §28-73-811.

**DEFINED TERMS.****Accounting period.**

- Uniform principal and income act,  
§28-70-102.

**Acknowledged.**

- Power of attorney, §28-68-119.

**Action.**

- Arkansas trust code, §28-73-103.

**Adult.**

- Adult guardianship and protective proceedings jurisdiction,  
§28-74-102.
- Custodial trusts, §28-72-401.

**Advanced fraction.**

- Estate tax apportionment, §28-54-106.

**Advanced tax.**

- Estate tax apportionment, §28-54-106.

**Agent.**

- Power of attorney, §28-68-102.

**Apportionable estate.**

- Uniform estate tax apportionment,  
§28-54-102.

**Ascertainable standard.**

- Arkansas trust code, §28-73-103.

**DEFINED TERMS —Cont'd****Asset-backed securities.**

- Uniform principal and income act,  
§28-70-415.

**Beneficiary.**

- Arkansas trust code, §28-73-103.
- Custodial trusts, §28-72-401.
- Uniform principal and income act,  
§28-70-102.

**Beneficiary designation.**

- Disclaimer of property interests,  
§28-2-212.

**Beneficiary form.**

- Transfer on death security registration, §28-14-101.

**Benefits.**

- Veterans' guardianship, §28-66-101.

**Benefits from governmental programs or civil or military service.**

- Power of attorney, §28-68-214.

**Charitable purpose.**

- Prudent management of institutional funds, §28-69-802.

**Charitable trust.**

- Arkansas trust code, §28-73-103.

**Child.**

- Probate, §28-1-102.

**Claim.**

- Probate, §28-1-102.

**Community property.**

- Arkansas trust code, §28-73-103.

**Conservator.**

- Adult guardianship and protective proceedings jurisdiction,  
§28-74-102.

- Arkansas trust code, §28-73-103.

- Custodial trusts, §28-72-401.

**Co-owners with right of survivorship.**

- Simultaneous death act, §28-10-201.

**County.**

- Probate, §28-1-102.

**Court.**

- Custodial trusts, §28-72-401.

**Custodial trustee, §28-72-401.****Custodial trust property, §28-72-401.****Deceased viable fetus.**

- Probate code, §28-1-118.

**Derivative.**

- Uniform principal and income act,  
§28-70-414.

**Descendants.**

- Intestate succession, §28-9-202.

**Devise.**

- Probate, §28-1-102.

**Devisee.**

- Probate, §28-1-102.



**DEFINED TERMS —Cont'd****Devisee —Cont'd**

Transfer on death security  
registration, §28-14-101.

**Disclaimant.**

Disclaimer of property interests,  
§28-2-202.

**Disclaimed interest.**

Disclaimer of property interests,  
§28-2-202.

**Disclaimer.**

Disclaimer of property interests,  
§28-2-202.

**Distributee.**

Probate, §28-1-102.

**Durable.**

Power of attorney, §28-68-102.

**Dying intestate.**

Intestate succession, §28-9-202.

**Electronic.**

Power of attorney, §28-68-102.

**Emergency.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-201.

**Endowed.**

Dower and curtesy, §28-11-101.

**Endowment fund.**

Prudent management of institutional  
funds, §28-69-802.

**Entity.**

Uniform principal and income act,  
§28-70-401.

**Environmental law.**

Arkansas trust code, §28-73-103.  
Fiduciaries, §28-69-301.

**Essential requirements for health or  
safety.**

Guardian, §28-65-101.

**Estate.**

Fiduciaries, §28-69-301.  
Probate, §28-1-102.  
Veterans' guardianship, §28-66-101.

**Estate, trust or other beneficial  
interest.**

Power of attorney, §28-68-213.

**Estate tax.**

Uniform estate tax apportionment,  
§28-54-102.

**Evaluation.**

Guardians, §28-65-101.

**Fiduciary.**

Banks and trust companies,  
§28-69-201.  
Disclaimer of property interests,  
§28-2-202.  
Incorporation of powers by reference,  
§28-69-301.

**DEFINED TERMS —Cont'd****Fiduciary —Cont'd**

Probate, §28-1-102.  
Uniform principal and income act,  
§28-70-102.

**Foreign personal representative.**

Probate, §28-1-102.

**Future interest.**

Disclaimer of property interests,  
§28-2-206.

**Gift instrument.**

Prudent management of institutional  
funds, §28-69-802.

**Good faith.**

Power of attorney, §28-68-102.

**Governing instrument.**

Simultaneous death act, §28-10-201.

**Grantor.**

Fiduciaries, §28-69-102.

**Gross estate.**

Uniform estate tax apportionment,  
§28-54-102.

**Gross income.**

Long-term intergenerational security  
trusts, §28-72-503.

**Guardian.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

Arkansas trust code, §28-73-103.

Custodial trusts, §28-72-401.

Fiduciary relationships, §28-65-101.

Veterans' guardianship, §28-66-101.

**Guardian ad litem.**

Fiduciary relationships, §28-65-101.

**Guardianship order.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Guardianship proceeding.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Hazardous substance.**

Fiduciaries, §28-69-301.

**Health care provider.**

Decedents' estates, §28-1-119.

**Heirs.**

Probate, §28-1-102.  
Transfer on death security  
registration, §28-14-101.

**Home state.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-201.

**Incapacitated.**

Custodial trusts, §28-72-401.

**DEFINED TERMS —Cont'd****Incapacitated person.**

Adult guardianship and protective proceedings jurisdiction, §28-74-102.

Guardian, §28-65-101.

**Incapacity.**

Power of attorney, §28-68-102.

**Income.**

Uniform principal and income act, §28-70-102.

Veterans' guardianship, §28-66-101.

**Income beneficiary.**

Uniform principal and income act, §28-70-102.

**Income interest.**

Uniform principal and income act, §28-70-102.

**Institution.**

Prudent management of institutional funds, §28-69-802.

**Institutional fund.**

Prudent management of institutional funds, §28-69-802.

**Insulated property.**

Estate tax apportionment, §28-54-106.

**Interested persons.**

Probate, §28-1-102.

**Interests of the beneficiaries.**

Arkansas trust code, §28-73-103.

**Jointly held property.**

Disclaimer of property interests, §28-2-202.

**Jurisdiction.**

Arkansas trust code, §28-73-103.

**Lease.**

Probate, §28-1-102.

**Least restrictive alternative.**

Guardians, §28-65-101.

**Legacy.**

Probate, §28-1-102.

**Legal representative.**

Custodial trusts, §28-72-401.

**Legatee.**

Probate, §28-1-102.

**Letters.**

Probate, §28-1-102.

**Limited guardian.**

Fiduciary relationships, §28-65-101.

**Long-term intergenerational security trust.**

§28-72-503.

**Mandatory income interest.**

Uniform principal and income act, §28-70-102.

**Member of beneficiary's family.**

Custodial trusts, §28-72-401.

**Mortgage.**

Probate, §28-1-102.

**DEFINED TERMS —Cont'd****Net estate.**

Probate, §28-1-102.

**Net income.**

Uniform principal and income act, §28-70-102.

**Party.**

Adult guardianship and protective proceedings jurisdiction, §28-74-102.

**Payments.**

Uniform principal and income act, §28-70-409.

**Payor.**

Simultaneous death act, §28-10-201.

**Person.**

Adult guardianship and protective proceedings jurisdiction, §28-74-102.

Arkansas trust code, §28-73-103.

Custodial trusts, §28-72-401.

Disclaimer of property interests, §28-2-202.

Power of attorney, §28-68-102.

Probate, §28-1-102.

Prudent management of institutional funds, §28-69-802.

Transfer on death security registration, §28-14-101.

Uniform estate tax apportionment, §28-54-102.

Uniform principal and income act, §28-70-102.

Veterans' guardianship, §28-66-101.

**Personal representative.**

Custodial trusts, §28-72-401.

Probate, §28-1-102.

Transfer on death security registration, §28-14-101.

**Power of attorney, §28-68-102.****Power of withdrawal.**

Arkansas trust code, §28-73-103.

**Presently exercisable general power of appointment.**

Power of attorney, §28-68-102.

**Principal.**

Power of attorney, §28-68-102.

Uniform principal and income act, §28-70-102.

**Professional.**

Guardians, §28-65-101.

**Program-related asset.**

Prudent management of institutional funds, §28-69-802.

**Property.**

Arkansas trust code, §28-73-103.

Power of attorney, §28-68-102.



**DEFINED TERMS —Cont'd****Property —Cont'd**

Transfer on death security  
registration, §28-14-101.

**Protected person.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Protective order.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Protective proceeding.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Qualified beneficiary.**

Arkansas trust code, §28-73-103.

**Ratable.**

Uniform estate tax apportionment,  
§28-54-102.

**Record.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

Disclaimer of property interests,  
§28-2-205.

Power of attorney, §28-68-102.

Prudent management of institutional  
funds, §28-69-802.

**Register.**

Transfer on death security  
registration, §28-14-101.

**Registering entity.**

Transfer on death security  
registration, §28-14-101.

**Remainder beneficiary.**

Uniform principal and income act,  
§28-70-102.

**Respondent.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

**Retirement plan.**

Power of attorney, §28-68-215.

**Revocable.**

Arkansas trust code, §28-73-103.

**Securities.**

Transfer on death security  
registration, §28-14-101.

**Security account.**

Transfer on death security  
registration, §28-14-101.

**Separate fund.**

Uniform principal and income act,  
§28-70-409.

**Settlor.**

Arkansas trust code, §28-73-103.

**DEFINED TERMS —Cont'd****Sign.**

Power of attorney, §28-68-102.

**Signed.**

Disclaimer of property interests,  
§28-2-205.

**Significant-connection state.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-201.

**Special elective benefit.**

Estate tax apportionment, §28-54-107.

**Specified property.**

Estate tax apportionment, §28-54-107.

**Spendthrift provision.**

Arkansas trust code, §28-73-103.

**State.**

Adult guardianship and protective  
proceedings jurisdiction,  
§28-74-102.

Arkansas trust code, §28-73-103.

Custodial trusts, §28-72-401.

Disclaimer of property interests,  
§28-2-202.

Power of attorney, §28-68-102.

Transfer on death security  
registration, §28-14-101.

**Statutory form power of attorney,**  
§28-68-120.

**Stocks and bonds.**

Power of attorney, §28-68-102.

**Temporary guardian.**

Fiduciary relationships, §28-65-101.

**Terms of a trust.**

Arkansas trust code, §28-73-103.

Uniform principal and income act,  
§28-70-102.

**Time-limited interest.**

Uniform estate tax apportionment,  
§28-54-102.

**Time of distribution.**

Disclaimer of property interests,  
§28-2-206.

**Transfer or custodial trust,**

§28-72-401.

**Trust.**

Disclaimer of property interests,  
§28-2-202.

Fiduciaries, §28-69-102.

Trustee division of trusts act,  
§28-69-702.

**Trust company.**

Custodial trusts, §28-72-401.

Fiduciaries, §28-69-202.

**Trust department.**

Fiduciaries, §28-69-202.

**Trustees.**

Arkansas trust code, §28-73-103.

**DEFINED TERMS —Cont'd****Trustees —Cont'd**

Trustee division of trusts act,  
§28-69-702.

Uniform principal and income act,  
§28-70-102.

**Trust instrument.**

Arkansas trust code, §28-73-103.

**Uninsulated holder.**

Estate tax apportionment, §28-54-106.

**Uninsulated property.**

Estate tax apportionment, §28-54-106.

**Value.**

Uniform estate tax apportionment,  
§28-54-102.

**Ward.**

Guardian, §28-65-101.

Veterans' guardianship, §28-66-101.

**Will.**

Probate, §28-1-102.

**DEPOSITIONS.****Adult guardianship and protective proceedings jurisdiction.**

Deposition of witness from another  
state, §28-74-106.

**DEPOSITS.****Decedents' estates.****Assets.**

Bank deposits, §28-49-116.

**Executors and administrators.****Bonds, surety.**

Agreements between personal  
representatives and sureties as  
to deposit of assets, §28-48-209.

**DESCENT AND DISTRIBUTION.****Abatement, §28-53-107.****Accounts and accounting.**

Account not approved.

Order, §28-53-106.

Petition for settlement and  
distribution.

Account to include, §28-52-105.

**Administration.**

Reopening administration, §28-53-119.

**Advancements.**

Determination of advancements,  
§28-53-109.

Partial distribution, §28-53-102.

**Applicability of provisions.**

Wills and trusts to which act  
applicable, §28-53-202.

**Appreciation or depreciation of all assets.**

Assets distributed to be  
representative, §28-53-204.

**Community property.**

Disposition of community property,  
§§28-12-101 to 28-12-113.

**DESCENT AND DISTRIBUTION****—Cont'd****Contribution, §28-53-108.****Delivery of property before final order.**

Partial distribution, §28-53-102.

**Depreciation of all assets.**

Assets distributed to be  
representative, §28-53-204.

**Designation of heirs, §28-8-102.****Determination of advancements, §28-53-109.****Determination of heirship, §28-53-101.****Discharge of personal representative, §28-53-118.****Disposition of community property, §§28-12-101 to 28-12-113.****Distribution in kind, §28-53-114.****Dower and curtesy.**

Assignment of dower and curtesy,  
§§28-39-301 to 28-39-309.

General provisions, §§28-11-101 to  
28-11-405.

**Encumbered property.**

Exoneration, §28-53-113.

**Escheated estates.**

General provisions, §§28-13-101 to  
28-13-112.

Law of escheats not to be repealed by  
provisions, §28-53-117.

**Executors and administrators.**

Discharge of personal representative,  
§28-53-118.

**Existing laws.**

No implied change, §28-53-201.

**Exoneration of encumbered property, §28-53-113.****Heirship.**

Determination, §28-53-101.

**Improper distribution, §28-53-110.****Income, §28-53-112.****Increments, §28-53-112.****In kind distribution, §28-53-114.****Interest, §28-53-112.****Intestate succession, §§28-9-201 to 28-9-220.****Liability.**

Improper distribution, §28-53-110.

**Missing distributees, §28-53-116.****No implied change in existing laws, §28-53-201.****Offsetting of indebtedness, §28-53-111.****Order in which assets appropriated, §28-53-107.****Order of final distribution.**

Conclusiveness, §28-53-105.



**DESCENT AND DISTRIBUTION**

—Cont'd

**Order of final distribution** —Cont'd

Contents, §28-53-104.

Hearing, §28-53-103.

Notice, §28-53-103.

**Partial distribution**, §28-53-102.**Partition for purpose of distribution**, §28-53-115.**Prior distributions not invalidated**, §28-53-201.**Reopening administration**, §28-53-119.**Right of retainer**, §28-53-111.**Simultaneous death act**, §§28-10-201 to 28-10-212.**Survivorship abolished**, §28-8-101.**Transfers to surviving spouse**, §28-53-203.

Market value at least equal to federal estate tax value, §28-53-203.

**Trusts to which act applicable**, §28-53-202.**Unavailable distributees**, §28-53-116.**Undivided interest**.

Partition, §28-53-115.

**Uniform simultaneous death act**, §§28-10-201 to 28-10-212.**Valuations**.

Alternative valuations, §28-53-205.

Market value equal to federal estate tax value, §28-53-205.

Appreciation or depreciation of all assets.

Assets distributed to be representative, §28-53-204.

Transfers to surviving spouse.

Market value at least equal to federal estate tax value, §28-53-203.

**Wills to which act applicable**, §28-53-202.**DEVISES.****Decedents' estates**.

Disposition of community property.

Perfection of title, §28-12-105.

**Dower and curtesy**.

Deemed in lieu of dower or curtesy, §28-11-404.

**DISABILITIES, INDIVIDUALS WITH.****Conservators for elderly and individuals with disabilities**, §§28-67-101 to 28-67-111.**DISCLAIMER OF PROPERTY INTERESTS**, §§28-2-201 to 28-2-221.**Applicability of other law**, §28-2-204.**DISCLAIMER OF PROPERTY INTERESTS** —Cont'd**Barring of right**, §28-2-213.**Construction of provisions**, §28-2-218.**Definitions**, §28-2-202.**Delivery**, §28-2-212.

Electronic delivery, §28-2-217.

**Effective date of provisions**, §28-2-220.**Electronic signatures act, relation**, §28-2-217.**Fiduciaries**, §28-2-211.

Delivery of disclaimer, §28-2-212.

**Filing**, §28-2-212.**Form required**, §28-2-205.**General rules of disclaimer**, §28-2-206.**Incompetent persons**, §28-2-216.**Irrevocability**, §28-2-205.**Jointly held property**, §28-2-207.

Delivery of disclaimer, §28-2-212.

**Limitation of right**, §28-2-213.**Partial disclaimer**, §28-2-205.**Power of appointment**, §28-2-209.

Delivery of disclaimer, §28-2-212.

When effective, §28-2-210.

**Power to disclaim**, §28-2-205.**Real property, recordation**, §28-2-215.**Repeals**, §28-2-221.**Rules applicable**, §28-2-206.**Scope of provisions**, §28-2-203.**Short title**, §28-2-201.**Supplemented by other law**, §28-2-204.**Tax qualified disclaimer**, §28-2-214.**Trustees**, §28-2-208.**DIVORCE.****Wills**.

Revocation by change in circumstances, §28-25-109.

**DOCTRINE OF WORTHIER TITLE.****Abolished**, §28-9-220.

Inter vivos conveyances to heirs or next of kin, §28-9-220.

**DOCUMENTS.****Decedents' estates**.

Real property.

Sale, mortgage, lease or exchange.

Title documents, §28-51-307.

**DOWER AND CURTESY.****Accounts and accounting**, §28-11-306.**Actions of spouse**.

Not to bar right to dower or curtesy, §28-11-201.

**DOWER AND CURTESY —Cont'd**  
**Aliens.**

- Surviving spouse of alien.
- Entitled to dower or curtesy,  
§28-11-202.

**Assignment.**

- Acceptance of assignment.
- Statement by heir, §28-39-301.
- Surviving spouses, §28-39-301.
- Buildings.
- Inclusion of dwelling in assignment,  
§28-39-304.

**Commissioners.**

- Appointment, §28-39-304.
- Duties, §28-39-304.
- Laying off dower or curtesy.
- According to selection of surviving  
spouse, §28-39-304.
- Reports, §28-39-304.
- Confirmation or correction,  
§28-39-304.
- Effect of approval, §28-39-304.
- Costs of allotment, §28-39-303.

**Crops.**

- Surviving spouses bequest of  
growing crops, §28-39-308.

**Damages.**

- Recovery of dower or curtesy lands  
deforced from surviving spouse  
possession, §28-39-309.

**Defense when action against  
incompetent person, §28-39-303.****Dwellings.**

- Inclusion of dwelling in assignment,  
§28-39-304.

**Effect, §28-39-301.****Guardians.**

- Minor heirs acting by guardians,  
§28-39-301.

**Heirs.**

- Assignment by heirs, §28-39-302.
- Acceptance of assignment.
- Statement by heir, §28-39-301.
- Agreement condition precedent to  
assignment, §28-39-302.
- Oil and gas leases.
- Heirs to grant surviving spouse  
rights, §28-39-302.
- Surviving spouse entitled to  
royalty payments,  
§28-39-302.
- Procedure, §28-39-302.
- Sale of timber, §28-39-302.
- Duty of heirs at law, §28-39-301.
- Heirs at law to assign, §28-39-301.
- Minor heirs acting by guardian,  
§28-39-301.

**DOWER AND CURTESY —Cont'd**  
**Assignment —Cont'd**

- Inclusion of dwelling in assignment,  
§28-39-304.

**Land alienated by heir.**

- Rights of surviving spouse,  
§28-39-307.

**Laying off dower and curtesy.**

- According to selection of surviving  
spouse, §28-39-304.

**Mental health.**

- Defense when action against  
incompetent persons,  
§28-39-303.

**Minors.**

- Defense when action against  
incompetent persons,  
§28-39-303.
- Minor heirs acting by guardian,  
§28-39-301.

**Notice.**

- Surviving spouses petitioned for  
allotment, §28-39-303.

**Oil and gas leases.**

- Heirs to grant surviving spouse  
rights in leases, §28-39-302.
- Surviving spouse entitled to royalty  
payments, §28-39-302.

**Order for allotment, §28-39-303.****Pleadings.**

- No verification of pleadings  
required, §28-39-303.

**Real property.**

- Lands alienated by heir.
- Rights of surviving spouses,  
§28-39-307.
- Recovery of dower or curtesy lands.
- Deforced from surviving spouse  
possession, §28-39-309.
- Rental of lands where indivisible,  
§28-39-305.
- Sale of property, §28-39-306.
- Dower or curtesy paid from  
proceeds, §28-39-306.
- Recordation, §28-39-301.
- Recovery of dower or curtesy lands  
deforced from surviving spouse  
possession, §28-39-309.
- Damages, §28-39-309.
- Rental of lands where indivisible,  
§28-39-305.
- Reports.
- Commissioner's report, §28-39-304.
- Confirmation or correction,  
§28-39-304.
- Effect of approval, §28-39-304.



**DOWER AND CURTESY —Cont'd****Assignment —Cont'd**

Royalties.

Oil and gas leases.

Surviving spouse entitled to  
royalty payments, §28-39-302.

Sale of property, §28-39-306.

Dower or curtesy paid from  
proceeds, §28-39-306.

Service of process.

Constructive service, §28-39-303.

Statement by heir.

Contents, §28-39-301.

Surviving spouses.

Bequest of growing crops,  
§28-39-308.

Lands alienated by heir.

Rights of surviving spouse,  
§28-39-307.

Oil and gas leases.

Entitlement to royalty payments,  
§28-39-302.Rights granted by heirs,  
§28-39-302.

Petitions for allotment.

General provisions, §28-39-303.

Sale of timber, §28-39-302.

Trees and timber.

Agreement condition precedent to  
assignment, §28-39-302.

Sale of timber, §28-39-302.

Trial, §28-39-303.

**Bond issues, §28-11-306.****Borrowing of right.**Actions of spouse not to bar,  
§28-11-201.When inchoate right of dower and  
curtesy barred, §28-11-203.**Buildings.**

Assignment of dower and curtesy.

Inclusion of dwelling in assignment,  
§28-39-304.**Community property.**

Disposition of community property.

No estate exists, §28-12-103.

**Conveyance of land to spouse or in  
trust for spouse in lieu of dower  
or curtesy, §28-11-401.**

Assent of spouse, §28-11-401.

**Conveyance of spouse's rights,  
§28-11-401.**Consent of spouse required,  
§28-11-201.**Costs.**

Assignment of dower and curtesy.

Costs of allotment, §28-39-303.

**DOWER AND CURTESY —Cont'd****Criminal law and procedure.**

Murder of spouse.

Effect on dower or curtesy,  
§28-11-204.**Crops.**

Assignment of dower and curtesy.

Surviving spouses bequest of  
growing crops, §28-39-308.**Damages.**

Assignment of dower and curtesy.

Recovery of dower or curtesy lands  
deforced from surviving spouse  
possession, §28-39-309.**Debts.**Accounts and evidences of debt,  
§28-11-306.**Definitions.**

"Endowed," §28-11-101.

**Descent of land upon death of  
spouse, §28-11-102.****Devise to spouse.**Deemed in lieu of dower or curtesy,  
§28-11-404.**Emblements.**Surviving spouses bequest of growing  
crop, §28-39-308.**Exchange of lands, §28-11-302.****Forfeiture of jointure, devise or  
pecuniary provision in lieu of  
dower or curtesy, §28-11-405.****Guardians.**

Assignment of dower and curtesy.

Minor heirs acting by guardian,  
§28-39-301.**Heirs.**Assignment of dower and curtesy,  
§§28-39-301 to 28-39-309.**Homicide.**Effect of murder on dower or curtesy,  
§28-11-204.**Intestate succession.**Descent of land upon death of spouse,  
§28-11-102.**Jointure in lieu of dower or curtesy,  
§28-11-401.**

Assent of spouse, §28-11-401.

Forfeiture, §28-11-405.

Without assent of spouse, §28-11-402.

**Lands held by way of mortgage.**No dower or curtesy interest,  
§28-11-303.**Leases.**

Assignment of dower and curtesy.

Oil and gas leases.

Heirs to grant surviving spouse  
rights in leases, §28-39-302.

**DOWER AND CURTESY —Cont'd**  
**Mental health.**

Assignment of dower and curtesy.  
 Defense when action against  
 incompetent persons,  
 §28-39-303.

**Mines and minerals.**

Money or royalties received,  
 §28-11-304.  
 Payment to surviving spouse,  
 §28-11-304.

**Minors.**

Assignment of dower and curtesy.  
 Defense when action against  
 incompetent person, §28-39-303.  
 Minor heirs acting by guardian,  
 §28-39-301.  
 When no children, §28-11-307.

**Mortgages and deeds of trust.**

Lands held by way of mortgage.  
 No dower or curtesy interest,  
 §28-11-303.  
 Mortgaged land, §28-11-303.  
 Purchase money mortgages.  
 Extent of dower or curtesy in land,  
 §28-11-303.  
 Sale of land by mortgagee.  
 Right to dower or curtesy in surplus,  
 §28-11-303.

**Murder of spouse.**

Effect on dower or curtesy, §28-11-204.

**Notes, §28-11-306.****Notice.**

Assignment of dower and curtesy.  
 Surviving spouses petitioned for  
 allotment, §28-39-303.

**Oil and gas.**

Assignment of dower and curtesy.  
 Oil and gas leases.  
 Heirs to grant surviving spouse  
 rights in leases, §28-39-302.  
 Surviving spouse entitled to  
 royalty payments, §28-39-302.  
 Money or royalties received,  
 §28-11-304.  
 Payment to surviving spouse,  
 §28-11-304.  
 Payment to surviving spouse,  
 §28-11-304.  
 Purchasers or lessees to withhold  
 payments until rights of surviving  
 spouse determined, §28-11-304.

**Orders.**

Assignment of dower and curtesy.  
 Order for allotment, §28-39-303.

**Pecuniary provision in lieu of dower  
or curtesy in land, §28-11-401.**

Election, §28-11-402.  
 Forfeiture, §28-11-405.

**DOWER AND CURTESY —Cont'd**  
**Personal property, §28-11-305.****Petitions for allotment.**

Contents, §28-39-303.  
 Defense when action against  
 incompetent persons, §28-39-303.  
 Formal pleadings unnecessary,  
 §28-39-303.  
 Notice, §28-39-303.  
 No verification of pleadings required,  
 §28-39-303.  
 Service of process, §28-39-303.  
 Surviving spouses, §28-39-303.

**Pleadings.**

Assignment of dower and curtesy.  
 Formal pleadings unnecessary,  
 §28-39-303.  
 No verification of pleadings  
 required, §28-39-303.

**Provision in will in lieu of dower or  
curtesy in lands, §28-11-403.****Purchase money mortgages.**

Extent of interest in land, §28-11-303.

**Real property.**

Conveyance of land to spouse or in  
 trust for spouse in lieu of dower or  
 curtesy, §28-11-401.  
 Exchange of lands, §28-11-302.  
 Jointure in lieu of dower or curtesy,  
 §§28-11-401, 28-11-402, 28-11-405.  
 Land generally, §28-11-301.  
 Assignment of dower and curtesy,  
 §§28-39-305 to 28-39-309.  
 Lands held by way of mortgage.  
 Not dower or curtesy interest,  
 §28-11-303.  
 Mortgaged land, §28-11-303.  
 Pecuniary provision in lieu of dower or  
 curtesy in land, §§28-11-401,  
 28-11-402, 28-11-405.  
 Purchase money mortgages.  
 Extent of interest in land,  
 §28-11-303.  
 Sale of land by mortgagee.  
 Right to dower or curtesy in surplus,  
 §28-11-303.

**Wills.**

Provision in will in lieu of dower or  
 curtesy in lands, §28-11-403.

**Recordation.**

Assignment of dower and curtesy.  
 Acceptance of assignment,  
 §28-39-301.

**Rent.**

Assignment of dower and curtesy.  
 Rental of lands where indivisible,  
 §28-39-305.



**DOWER AND CURTESY —Cont'd**  
**Reports.**

- Assignment of dower and curtesy.
- Commissioner's report, §28-39-304.
- Confirmation or correction,  
§28-39-304.
- Effect of approval, §28-39-304.

**Royalties.**

- Assignment of dower and curtesy.
- Oil and gas leases.
- Surviving spouse entitled to  
royalty payments, §28-39-302.
- Payments to surviving spouse,  
§28-11-304.
- Sale of timber, oil, gas or mineral  
leases, §28-11-304.
- Withholding payments until rights of  
surviving spouse determined,  
§28-11-304.

**Sale of land by mortgagee.**

- Right to dower or curtesy in surplus,  
§28-11-303.

**Service of process.**

- Assignment of dower and curtesy.
- Constructive service, §28-39-303.

**Trees and timber.**

- Assignment of dower and curtesy.
- Agreement.
- Condition precedent to  
assignment, §28-39-302.
- Sale of timber, §28-39-302.
- Money or royalties received,  
§28-11-304.
- Payment to surviving spouse,  
§28-11-304.

**Trial.**

- Assignment of dower and curtesy,  
§28-39-303.

**When inchoate right barred,**  
§28-11-203.**Wills.**

- Provision in will in lieu of dower or  
curtesy in lands, §28-11-403.

**DURESS.****Trusts and trustees.**

- Creation of trust.
- Fraud, duress or undue influence,  
§28-73-406.

**E****ELECTRONIC TRANSACTIONS.****Trusts and trustees.**

- Arkansas trust code, §28-73-1102.

**EMBEZZLEMENT.****Decedents' estates.**

- Assets, §28-49-105.

**EMBLEMMENTS.****Dower and curtesy.**

- Surviving spouse's bequest of growing  
crop, §28-39-308.

**ENDORSEMENTS.****Trusts and trustees.**

- Public trusts.
- Acceptance endorsed on trust  
instrument, §28-72-202.

**ESCHEAT.****Decedents' estates.**

- Descent and distribution.
- Provisions not to repeal law of  
escheats, §28-53-117.
- Escheated estates, §§28-13-101 to  
28-13-112.

**Intestate succession.**

- Lack of person capable of inheriting,  
§28-9-215.

**Prosecuting attorneys.**

- Decedents' estates.
- Duties, §§28-13-105, 28-13-106.

**Social services.**

- Decedents' estates.
- Claims.
- Reimbursement for nursing care,  
§28-13-103.

**ESTATES.****Missing persons,** §§28-72-101 to  
28-72-104.**Prisons and prisoners.**

- Persons imprisoned in foreign  
countries, §§28-72-101 to  
28-72-104.

**ESTATE TAX.****Apportionment,** §§28-54-101 to  
28-54-115.

- Advancement of tax, §28-54-106.
- Collection of tax by fiduciary,  
§28-54-109.
- Construction of provisions, §28-54-112.
- Delayed application, §28-54-114.
- Effective date of provisions,  
§28-54-115.
- Severability, §28-54-113.
- Credits against taxes, §28-54-105.
- Declaratory judgment on enforcement  
of provisions, §28-54-111.
- Deferrals of taxes, §28-54-105.
- Definitions, §28-54-102.
- Delayed application, §28-54-114.
- Effective date of provisions,  
§28-54-115.
- Fiduciary, property in possession of,  
§28-54-108.
- Insulated property, §28-54-106.

**ESTATE TAX —Cont'd****Apportionment —Cont'd**

Overpayment, right of reimbursement,  
§28-54-110.

Recapture provisions, §28-54-107.

Recovery of ratable portion of  
advancement, §28-54-106.

Severability of provisions, §28-54-113.

Special elective benefits, §28-54-107.

Statutory apportionment, §28-54-104.

Title of uniform act, §28-54-101.

Uniform application and construction  
of provisions, §28-54-112.

Will or other dispositive instrument,  
§28-54-103.

**Uniform estate tax apportionment  
act, §§28-54-101 to 28-54-115.**

**EVIDENCE.**

**Adult guardianship and protective  
proceedings jurisdiction.**

Best evidence rule, applicability,  
§28-74-106.

**Death.**

Simultaneous death act.

Evidence of death or status,  
§28-10-205.

**Guardians, §28-65-211.**

**Simultaneous death.**

Evidence of death or status,  
§28-10-205.

**Trusts and trustees.**

Arkansas trust code.

Oral trusts, §28-73-407.

**Wills.**

Affidavits of attesting witnesses,  
§28-25-106.

Probate of wills.

Lost or destroyed wills, §28-40-117.

Manner of taking testimony,  
§28-40-118.

No will effectual until probated.

Unprobated wills admitted as  
evidence, §28-40-104.

Act supplemental to existing  
laws, §28-40-104.

Proof of attested will by other  
evidence, §28-40-117.

Testimony to prove will, §28-40-117.

**EXECUTION OF JUDGMENTS.****Decedents' estates.**

Claims.

Execution and levies prohibited,  
§28-50-114.

Real property.

Sale, mortgage, lease or exchange,  
§28-51-306.

**EXECUTION OF JUDGMENTS**

—Cont'd

**Decedents' estates —Cont'd**

Sale, mortgage, lease or exchange of  
real property.

Execution of conveyance or other  
instrument by personal  
representative, §28-51-306.

**Wills, §28-25-103.**

Foreign execution, §28-25-105.

Witnesses, §28-25-103.

**EXECUTORS AND****ADMINISTRATORS.****Accounts and accounting.**

General provisions, §§28-52-101 to  
28-52-110.

**Administrators with will annexed.**

Allowance for defending will,  
§28-48-109.

Rights and powers, §28-48-107.

**Ancillary administration.**

Applicability of general law,  
§28-42-101.

Bankruptcy and insolvency.

Payment of claims in case of  
insolvency, §28-42-108.

Bonds, surety, §28-42-103.

Claims.

Payment of claims, §28-42-107.

In case of insolvency, §28-42-108.

Debts.

Payment and delivery of property to  
domiciliary foreign personal  
representative, §28-42-110.

Domiciliary administration.

Transfer of residue to domiciliary  
personal representative,  
§28-42-109.

Domiciliary jurisdiction.

Removal of assets to domiciliary  
jurisdiction, §28-42-106.

General law to apply, §28-42-101.

Jurisdiction over foreign personal  
representative, §28-42-111.

Letters testamentary and of  
administration.

Applications, §28-42-102.

Notice.

Applications for ancillary letters,  
§28-42-102.

Nonresident to designate agent to  
receive notice, §28-42-104.

Payment of claims, §28-42-107.

In case of insolvency, §28-42-108.

Procedure.

General law to apply, §28-42-101.

Removal of assets to domiciliary  
jurisdiction, §28-42-106.



**EXECUTORS AND****ADMINISTRATORS —Cont'd****Ancillary administration —Cont'd**  
Residue.

Transfer to domiciliary personal representative, §28-42-109.

Substitution of foreign for local representative, §28-42-105.

Effect of substitution, §28-42-105.

**Ancillary probate.**

Foreign wills, §28-40-120.

**Appointment, §28-40-111.**

Ancillary administration.

Applications for ancillary letters, §28-42-102.

Nonresident to designate agent to receive notice, §28-42-104.

Notice, §28-40-111.

Termination of appointment.

Death or incompetency of personal representative, §28-48-106.

When personal representative may be removed, §28-48-105.

**Assets.**

Ancillary administration.

Removal of assets to domiciliary jurisdiction, §28-42-106.

Transfer of residue to domiciliary personal representative, §28-42-109.

**Attorneys at law.**

Employment of attorneys, §28-48-108.

Fees, §28-48-108.

**Bankruptcy and insolvency.**

Ancillary administration.

Payment of claims.

In case of insolvency, §28-42-108.

**Bonds, surety.**

Agreements between personal representative and surety as to deposit of assets, §28-48-209.

Amount, §28-48-201.

Ancillary administration, §28-42-103.

Approval of bond, §28-48-205.

Court may increase or decrease bond, §28-48-206.

Decreased in bond, §28-48-206.

Dispensing with bond, §28-48-206.

Enforcement of obligations, §28-48-208.

Form of bond, §28-48-204.

Increase of bond, §28-48-206.

Joint personal representative, §28-48-201.

Liability of original and new sureties, §28-48-203.

Liability of sureties, §28-48-207.

Obligations, §28-48-207.

**EXECUTORS AND****ADMINISTRATORS —Cont'd****Bonds, surety —Cont'd**

Personal representatives and sureties.

Enforcement of obligations, §28-48-208.

Persons not to be surety, §28-48-203.

Procedure, §28-48-201.

Public administrators, §28-48-303.

Reduction in bonds, §28-48-206.

Release of sureties before estate fully administered, §28-48-203.

When letters deemed revoked, §28-48-202.

Who may not be surety, §28-48-203.

**Claims.**

Ancillary administration.

Payment of claims, §28-42-107.

In case of insolvency, §28-42-108.

**Community property.**

Disposition of community property.

Perfection of title of personal representative, §28-12-105.

**Compensation, §28-48-108.****Conservation of estate.**

Death or incompetency of personal representative, §28-48-106.

**Credit and creditors.**

Notice to creditor of appointment, §28-40-111.

**Death, §28-48-106.****Deposits.**

Bonds, surety.

Agreements between personal representatives and sureties as to deposit of assets, §28-48-209.

**Dispensing with administration, §§28-41-101 to 28-41-104.****Distribution of estate.**

Discharge of personal representative, §28-53-118.

**Domiciliary administration.**

Ancillary administration.

Payment of debt and delivery of property to domiciliary foreign personal representative, §28-42-110.

Removal of assets to domiciliary jurisdiction, §28-42-106.

Transfer of residue to domiciliary personal representative, §28-42-109.

**Employment of necessary persons authorized, §28-48-108.****Fees, §28-48-108.**

Attorneys at law, §28-48-108.

**EXECUTORS AND  
ADMINISTRATORS —Cont'd**  
**Fiduciaries.**

Definition of fiduciary to include  
executor and administrator,  
§28-69-201.

**Foreign personal representatives.**  
Ancillary administration, §§28-42-101  
to 28-42-111.

**Foreign wills.**  
Ancillary probate, §28-40-120.

**Forms.**  
Bonds, surety, §28-48-204.  
Official probate forms, Probate Law  
Appx (Title 28).

**Inventory, §28-49-110.**  
Debt of executor, §28-49-111.  
Public administrators, §28-48-302.  
Supplemental inventory, §28-49-110.

**Investments.**  
Prudent man rule for investments,  
§§28-71-101 to 28-71-107.

**Joint personal representatives.**  
Bonds, surety, §28-48-201.  
Exercise of powers, §28-48-104.  
Powers of surviving personal  
representatives, §28-48-104.

**Letters testamentary and of  
administration.**  
Ancillary administration.  
Applications, §28-42-102.  
Ancillary letters.  
Application and notice thereof,  
§28-42-102.

Bonds, surety.  
When letters deemed revoked,  
§28-48-202.

Forms, §28-48-102.

Issuance.  
When letters to be issued,  
§28-48-102.

Persons entitled to domiciliary letters,  
§28-48-101.

When letters to be issued, §§28-40-119,  
28-48-102.

Wills.  
Probate of wills.  
When probate ordered and letters  
granted, §28-40-119.

**Mental health.**  
Incompetency of personal  
representative, §28-48-106.  
When personal representative may be  
removed, §28-48-105.

**Nonresidents.**  
Ancillary administration generally,  
§§28-42-101 to 28-42-111.

**EXECUTORS AND  
ADMINISTRATORS —Cont'd**  
**Notice.**

Ancillary administration.  
Application for ancillary letters,  
§28-42-102.

Nonresident to designate agent to  
receive notice, §28-42-104.

Appointment, §28-40-111.

**Probate of wills, §28-40-106.**

**Prudent man rule for investments,**  
§§28-71-101 to 28-71-107.

**Public administrators.**  
Accounts and accounting.  
Inventory, §28-48-302.  
To regular personal representative,  
§28-48-304.

Bonds, surety, §28-48-303.

Expiration of sheriff's term,  
§28-48-305.

Inventory.  
Accounts and accounting,  
§28-48-302.  
Administration, §28-48-302.

Sheriffs.  
Designated public administrator,  
§28-48-301.

Expiration of term, §28-48-305.

**Removal, §28-48-105.**

**Sale, mortgage, lease or exchange of  
estate property.**

Petitions by personal representatives,  
§28-51-103.

When personal representatives may  
purchase, §28-51-106.

**Sheriffs.**  
Designated public administrator,  
§28-48-301.

Expiration of sheriff's term,  
§28-48-305.

Public administrators.  
General provisions, §§28-48-301 to  
28-48-305.

**Small estates.**  
Dispensing with administration,  
§§28-41-101 to 28-41-104.

**Special administrators, §28-48-103.**  
Appointment, §28-48-103.

**Succession of representatives.**  
Appointment in succession,  
§28-48-107.

Death, removal or resignation of  
personal representative,  
§28-48-107.

Powers, §28-48-107.

Rights and powers, §28-48-107.

**Surviving joint personal  
representative.**  
Powers, §28-48-104.



## **EXECUTORS AND ADMINISTRATORS —Cont'd**

### **Wills.**

Allowance for defending will,  
§28-48-109.

Probate of wills, §28-40-106.

### **EXONERATION.**

#### **Decedents' estates.**

Distribution.

Exoneration of encumbered  
property, §28-53-113.

### **EXPRESS TRUSTS.**

#### **Public trusts.**

State or state subdivision as  
beneficiary, §§28-72-201 to  
28-72-207.

#### **Trusts and trustees generally,**

§§28-73-101 to 28-73-1106.

## **F**

### **FEES.**

#### **Decedents' estates.**

Dispensing with administration.

Affidavit of distributee, §28-41-101.

Escheated estates.

Sale of real property.

Sheriff's fees, §28-13-109.

Personal representatives, §28-48-108.

Real property.

Sale, mortgage, lease or exchange.

Broker's fee, §28-51-307.

Escheated estates.

Sheriff's fees, §28-13-109.

#### **Executors and administrators,**

§28-48-108.

Attorneys at law, §28-48-108.

### **FETUS.**

#### **Decedents' estates.**

Deceased viable fetus.

Jurisdiction over estate, §28-1-118.

### **FIDUCIARIES.**

#### **Accounts and accounting.**

Common trust funds, §28-69-202.

#### **African development bank.**

Obligations deemed legal investments,  
§28-69-205.

#### **Amendments.**

Charitable trusts.

Amendment of trust instrument by  
operation of law, §§28-72-301,  
28-72-302.

#### **Asian development bank.**

Obligations deemed legal investments,  
§28-69-205.

## **FIDUCIARIES —Cont'd**

### **Banks.**

African development bank.

Obligations deemed legal  
investments, §28-69-205.

Asian development bank.

Obligations deemed legal  
investments, §28-69-205.

Common trust funds, §28-69-202.

Accounting for investments,  
§28-69-202.

Investments by bank acting as  
fiduciary, §28-69-202.

### **Deposits.**

Investments kept separate from  
assets of bank, §28-69-203.

Liability for loss by acts of nominee,  
§28-69-203.

Records to show ownership of  
investments, §28-69-203.

Registration of investments,  
§28-69-204.

Trust funds, §28-69-101.

Agreement with surety,  
§28-69-101.

Approval of court, §28-69-101.

Definitions, §28-69-102.

Registration of investments in  
name of nominee, §28-69-203.

### **Inter-American development bank.**

Obligations deemed legal  
investments, §28-69-205.

### **International bank for reconstruction and development.**

Obligations deemed legal  
investments, §28-69-205.

### **Prudent man rule for investments.**

Legislative intent, §28-71-107.

Limited relaxation of rule.

Legislative intent, §28-71-107.

Private venture capital projects.

Limitations, §28-71-107.

Promulgation of rules and  
regulations, §28-71-107.

Rules and regulations.

Promulgation, §28-71-107.

### **Registration of investments.**

In name of nominee, §28-69-203.

Liability of corporation or agent,  
§28-69-204.

### **Transfer of investments.**

Liability of corporation or agent  
making transfer, §28-69-204.

### **World bank.**

Obligations deemed legal  
investments, §28-69-205.

### **Charitable trusts.**

Amendment of trust instrument by  
operation of law, §28-72-302.

**FIDUCIARIES —Cont'd****Charitable trusts —Cont'd**

Definitions, §28-72-301.

**Conservators.**

Elderly and individuals with disabilities, §§28-67-101 to 28-67-111.

**Curators.**

Definition of fiduciary to include, §28-69-201.

**Definitions, §28-69-201.**

Charitable trusts.

Amendment of trust instrument by operation of law.

“The code,” §28-72-301.

Deposit of trust fund, §28-69-102.

Incorporation of trust powers by reference, §28-69-301.

**Deposits.**

Liability for loss by acts of nominee, §28-69-203.

Registration of investments in name of nominee, §28-69-203.

Transfer of investments.

Liability of corporation or agent making transfer, §28-69-204.

Trust funds, §28-69-101.

Agreement with surety, §28-69-101.

Approval of court, §28-69-101.

Definitions, §28-69-102.

**Disabilities, individuals with.**

Conservators for elderly and individuals with disabilities, §§28-67-101 to 28-67-111.

**Disclaimer of property interests,**

§28-2-211.

Delivery of disclaimer, §28-2-212.

**Environmental law compliance.**

Incorporation of trust powers by reference, §28-69-305.

**Estate tax apportionment.**

Collection of tax by fiduciary, §28-54-109.

Payment from property in possession of fiduciary, §28-54-108.

**Guardians.**

General provisions, §§28-65-101 to 28-65-604.

Veterans' guardianship act.

General provisions, §§28-66-101 to 28-66-124.

Prudent man rule for investments.

Uniform veterans' guardianship act not affected, §28-71-101.

**Incorporation of trust powers by reference.**

Authorized, §28-69-303.

**FIDUCIARIES —Cont'd****Incorporation of trust powers by reference —Cont'd**

Court powers over fiduciary unaffected, §28-69-302.

Definitions, §28-69-301.

Effect, §28-69-303.

Enumeration of powers, §28-69-304.

Environmental law compliance, §28-69-305.

Power of court over fiduciary unaffected, §28-69-302.

Specifically enumerated fiduciary powers, §28-69-304.

**Inter-American development bank.**

Obligations deemed legal investments, §28-69-205.

**International bank for****reconstruction and development.**

Obligations deemed legal investments, §28-69-205.

**Investments.**

African development bank.

Obligations deemed legal investments, §28-69-205.

Asian development bank.

Obligations deemed legal investments, §28-69-205.

Banks.

Common trust funds, §28-69-202.

Common trust fund of bank.

Accounting for investments, §28-69-202.

Investments by bank acting as fiduciary, §28-69-202.

Inter-American development bank.

Obligations deemed legal investments, §28-69-205.

International bank for reconstruction and development.

Obligations deemed legal investments, §28-69-205.

Kept separate from assets of bank, §28-69-203.

Liability for loss by acts of nominee, §28-69-203.

Prudent investor rule, §§28-71-101 to 28-71-107.

Records to show ownership of investments, §28-69-203.

Registration of investments, §28-69-204.

In name of nominee, §28-69-203.

Liability of corporation or agent, §28-69-204.

Transfer of investments, §28-69-204.

Liability of corporation or agent making transfer, §28-69-204.



**FIDUCIARIES —Cont'd****Investments —Cont'd**

World bank.

Obligations deemed legal investments, §§28-69-205.

**Management of institutional funds,**

§§28-69-801 to 28-69-810.

**Powers of attorney.**

Breach of fiduciary duty by another agent.

Liability for failure to notify principal, §28-68-111.

**Principal and income act,**

§§28-70-101 to 28-70-606.

**Prudent investor rule.**

Additional authority to invest funds, §§28-71-101, 28-71-104.

Applicability of provisions, §28-71-103.

Authority to invest funds.

Additional authority, §28-71-101.

Authorized investments, §28-71-106.

Court powers.

Not limited by act, §28-71-102.

Fiduciaries subject to act, §28-71-103.

Generally, §28-71-105.

Investments authorized, §28-71-106.

Powers of court.

Not limited by act, §28-71-102.

Standard of judgment and care, §28-71-105.

Trusts and trustees, §§28-73-901 to 28-73-908.

Uniform veterans' guardianship act.

Not affected, §28-71-101.

**Prudent management of****institutional funds,** §§28-69-801 to 28-69-810.**Senior citizens.**

Conservators for elderly and individuals with disabilities, §§28-67-101 to 28-67-111.

**Trusts and trustees.**

Principal and income act generally, §§28-70-101 to 28-70-606.

**Veterans' guardianship act.**

General provisions, §§28-66-101 to 28-66-124.

Prudent man rule for investments.

Uniform veterans' guardianship act not affected, §28-71-101.

**Wills.**

Incorporation of trust powers by reference.

Generally, §§28-69-301 to 28-69-305.

**World bank.**

Obligations deemed legal investments, §28-69-205.

**FINES.****Decedents' estates.**

Homesteads.

Disturbance of possession, §28-39-207.

**Guardians.**

Oil, gas and mineral interests.

Sale, lease, etc.

Failure to report, §28-65-315.

Real property.

Transactions on behalf of ward.

Failure to report, §28-65-315.

**Oil and gas.**

Guardians.

Lease, sale, etc.

Failure to report, §28-65-315.

**FORECLOSURES.****Veterans' guardianship act.**

Purchaser at foreclosure of work's lien, §28-66-115.

**FOREIGN COUNTRIES.****Prisons and prisoners.**

Estates of persons imprisoned in foreign country, §§28-72-101 to 28-72-104.

**FOREIGN WILLS.****Ancillary probate,** §28-40-120.**FORMS.****Executors and administrators.**

Bonds, surety, §28-48-204.

**Power of attorney.**

Agent's certification, §28-68-302.

Statutory form, §28-68-301.

**Trusts and trustees.**

Custodial trust.

Acceptance of property by trustee, §28-72-404.

**Wills.**

Taking against will, §28-39-404.

**FRAUD.****Trusts and trustees.**

Arkansas trust code.

Creation of trust induced by fraud, §28-73-406.

**FRAUDULENT TRANSFERS.****Decedents' estates,** §28-49-109.**FUTURE INTERESTS.****Disclaimer of property interests.**

General rules of disclaimer, §28-2-206.

**G****GIFTS.****Disclaimer of property interests,**

§§28-2-201 to 28-2-221.

**GIFTS —Cont'd****Power of attorney.**

Authority granted under power,  
§28-68-217.

**GOOD FAITH.****Power of attorney.**

Acceptance of power of attorney and  
reliance on, §28-68-119.  
Agent under, §28-68-114.

**GUARDIAN AD LITEM.****Appointment.**

Powers of court, §28-1-111.

**Trusts and trustees.**

Arkansas trust code.  
Appointment of representative,  
§28-73-305.

**GUARDIAN AND WARD.****Abortion.**

Decisions requiring court approval,  
§28-65-302.

**Accountants.**

Employment of professionals by  
guardian, §28-65-319.

**Actions.**

Actions by ward against guardian.  
Venue, §28-65-109.

Prosecution of, §28-65-305.

**Administration of ward's estate.****Accounting.**

Death of ward, §28-65-323.

Filing, §28-65-320.

Notice of hearing, §28-65-320.

Action by ward for settlement of  
accounts.

Venue, §28-65-109.

**Annual report.**

Filing, §28-65-320.

Death of ward, §28-65-323.

**Adult guardianships.**

Jurisdiction, §28-65-107.

Uniform adult guardianship and  
protective proceedings jurisdiction  
act, §§28-74-101 to 28-74-505.

**Applicability of provisions.**

Bonds, surety, §28-65-215.

Conflicts of laws, §28-65-103.

Jurisdiction, §28-65-107.

Other acts, §28-65-103.

Property transactions on behalf of  
ward, §28-65-314.

Uniform veterans' guardianship act,  
§28-65-102.

Veterans, §28-65-102.

**Appointment of guardians.**

Authorized, §28-65-201.

Evaluation of incapacitated person,  
§28-65-212.

**GUARDIAN AND WARD —Cont'd****Appointment of guardians —Cont'd**

Factors considered, §28-65-204.

Hearing, §28-65-213.

Notice, §§28-65-207, 28-65-208.

Special notice of hearings.

Request for, §28-65-209.

Service, §§28-65-207, 28-65-208.

Order, §28-65-214.

**Petition.**

Contents, §28-65-205.

Separate accounts required,  
§28-65-206.

Separate petitions not required,  
§28-65-206.

Preferences, §28-65-204.

Proof required, §28-65-210.

**Removal.**

Grounds, §28-65-219.

Standby guardians, §28-65-221.

Substitution, §28-65-220.

Temporary guardian, §28-65-218.

Venue, §28-65-202.

**Attorneys at law.**

Employment of legal counsel,  
§28-65-319.

**Bonds, surety.**

Administration of estate.

Liability of guardian following death  
of ward, §28-65-403.

Amount, §28-65-215.

Applicability of provisions, §28-65-215.

Letters of guardianship.

Issuance, §28-65-216.

Termination of guardianship.

Discharge from liability, §28-65-403.

**Burden of proof.**

Appointment of guardians.

Proof required, §28-65-210.

**Care and custody of ward.**

Payments.

Generally, §§28-65-309, 28-65-310.

**Circuit court.**

Jurisdiction, §28-65-107.

**Orders.**

Appraisement of ward's property,  
§28-65-321.

Purchase of real property for ward.

Court authorization, §28-65-313.

Termination of guardianship.

Death of ward, §28-65-323.

Generally, §28-65-401.

Venue, §28-65-202.

**Claims.**

Claims against estate.

Personal liability of guardian,  
§28-65-317.

Settlement, §28-65-318.



**GUARDIAN AND WARD —Cont'd****Compensation**, §28-65-108.

Denial of compensation, §28-65-320.

Denial or reduction, §28-65-108.

**Compromise and settlement.**

Claims against estate, §28-65-318.

Decisions requiring court approval,  
§28-65-302.**Conflict of laws.**

Applicability of provisions, §28-65-103.

**Conservators for elderly and individuals with disabilities.**General provisions, §§28-67-101 to  
28-67-111.**Contracts.**Contracts for sale of property prior to  
incapacity.

Execution by guardian, §28-65-306.

**Convicted felon as guardian.**

Qualifications, §28-65-203.

**Corporations.**

Foreign guardians.

Corporate guardians, §28-65-603.

Qualifications, §28-65-203.

**Court approval of decisions.**Decisions requiring court approval,  
§28-65-302.**Definitions**, §28-65-101.

Incapacitated persons, §28-65-104.

**Disabilities, individuals with.**Conservators for elderly and  
individuals with disabilities,  
§§28-67-101 to 28-67-111.**Disclaimer of property interests.**Incompetent person as beneficiary,  
§28-2-216.**Dispensing with guardianship.**

Generally, §28-65-501.

Small estates, §28-65-502.

Ward receiving public assistance,  
§28-65-503.**Dower and curtesy.**

Assignment of dower and curtesy.

Minor heirs acting by guardian,  
§28-39-301.**Duties**, §28-65-301.**Evidence.**

Fees.

Testimony of qualified professionals,  
§28-65-211.

Hearings.

Testimony of qualified professionals.

Fees and costs, §28-65-211.

Testimony of qualified professionals.

Fees and costs, §28-65-211.

**Fees.**

Evidence.

Testimony of qualified professionals,  
§28-65-211.**GUARDIAN AND WARD —Cont'd****Fiduciaries.**Definition of fiduciary to include  
guardian, §28-69-201.**Foreign guardians.**

Corporate guardians, §28-65-603.

Inapplicability to guardianships under  
adult guardianship and protective  
proceedings jurisdiction act,  
§28-65-604.

Petition to act in Arkansas,

§28-65-601.

Effect of grant or denial, §28-65-602.

**Hearings.**

Evidence.

Testimony of qualified professionals.

Fees and costs, §28-65-211.

Fees.

Evidence.

Testimony of qualified  
professionals, §28-65-211.**Hospitals.**Care, treatment and confinement of  
ward, §28-65-303.**Incapacitated persons.**

Appointment of guardian.

Authorized, §28-65-201.

Venue, §28-65-202.

Defined, §28-65-101.

Evaluation, §28-65-212.

Purpose of guardianship, §28-65-105.

Rights, §28-65-106.

**Indigent persons.**Ward receiving public assistance,  
§28-65-503.**Inventory of ward's property.**

Generally, §28-65-321.

**Investments.**Prudent man rule for investments,  
§§28-71-101 to 28-71-107.**Jurisdiction.**

Applicability of provisions, §28-65-107.

**Letters of guardianship.**

Form, §28-65-217.

Issuance, §28-65-216.

Necessary language, §28-65-217.

**Liability.**

Claims against estate.

Personal liability of guardian,  
§28-65-317.

Settlement, §28-65-318.

Operation of ward's business,  
§28-65-307.**Loans and gifts on behalf of ward.**

Authorization by court, §28-65-308.

**Military affairs.**Veterans' guardianship act,  
§§28-66-101 to 28-66-124.

**GUARDIAN AND WARD —Cont'd**  
**Minors.**

- Dower and curtesy.
- Assignment of dower and curtesy.
- Minor heirs acting by guardian,  
§28-39-301.

**Wills.**

- Preferences in appointment of  
guardian for minor.
- Request in parent's will,  
§28-65-204.

**Nonresidents.**

- Qualifications, §28-65-203.

**Notice.**

- Appointment of guardian.
- Hearing, §§28-65-207 to 28-65-209.

**Office of public guardian for adults,**  
§§28-65-701 to 28-65-707.**Oil and gas.**

- Lease, sale, etc., §28-65-315.
- Operation and development.
- Agreements, §28-65-316.

**Operation of ward's business.**

- Liability, §28-65-307.

**Orders.**

- Care, treatment and confinement of  
ward, §28-65-303.
- Establishment of guardianship,  
§28-65-214.
- Wards.
- Appraisement of ward's property,  
§28-65-321.
- Payments for care and custody of  
ward, §28-65-309.

**Parent and child.**

- Dispensing with guardianship,  
§28-65-501.
- Termination of parental rights.
- Decisions of guardian requiring  
court approval, §28-65-302.

**Payments for care and custody of  
ward.**

- Distribution of ward's income,  
§28-65-310.
- Order, §28-65-309.

**Personal property.**

- Possession of ward's real and personal  
property.
- Title remaining in ward, §28-65-304.

**Petitions.**

- Appointment of guardian, §§28-65-205,  
28-65-206.
- Foreign guardians.
- Petition to act in Arkansas,  
§§28-65-601, 28-65-602.
- Public guardian for adults.
- Petition for appointment as  
guardian, §28-65-703.

**GUARDIAN AND WARD —Cont'd**  
**Power of attorney.**

- Authority granted under power.
- Conservatorships, guardianships or  
custodianships, §28-68-211.
- Nomination of guardian through,  
§28-68-108.

**Powers and limitations.**

- Property transactions on behalf of  
ward, §28-65-314.

**Presumptions.**

- Incapacitated persons not presumed  
incompetent, §28-65-106.

**Professional services.**

- Guardian may employ professionals,  
§28-65-319.

**Property transactions.**

- Authorization by court, §28-65-316.
- Transactions on behalf of ward.
- Applicability of provisions,  
§28-65-314.
- Powers and limitations, §28-65-314.
- Real property, §28-65-315.

**Prudent man rule for investments,**  
§§28-71-101 to 28-71-107.**Public guardian for adults,**

- §§28-65-701 to 28-65-707.
- Administrator of office, §28-65-701.
- Appointment, §28-65-702.
- Bond not required, §28-65-705.
- Correspondence and legal process,  
§28-65-704.
- Creation of office, §28-65-701.
- Duties, §28-65-703.
- Functions, §28-65-702.
- Petition for appointment as guardian,  
§28-65-703.
- Qualifications, §28-65-702.
- Recordkeeping, §28-65-703.
- Rules for implementation of  
provisions, §28-65-707.
- Termination of guardianship of ward,  
§28-65-706.

**Purpose of guardianship.**

- Incapacitated persons, §28-65-105.

**Qualifications, §28-65-203.****Real property.**

- Possession of ward's real and personal  
property.
- Title remaining in ward, §28-65-304.
- Property transactions on behalf of  
ward.
- Leases.
- Generally, §28-65-315.
- Report to court.
- Failure to report, §28-65-315.

**Removal.**

- Grounds, §28-65-219.



**GUARDIAN AND WARD —Cont'd****Reports**, §§28-65-301, 28-65-322.

Temporary guardian, §28-65-218.

**Resignation.**

Substitution, §28-65-220.

**Senior citizens.**

Conservators for elderly and individuals with disabilities, §§28-67-101 to 28-67-111.

**Service of process.**

Actions against guardian, §28-65-305.

**Small estates.**

Delivery of money and property to suitable person, §28-65-503.

Ward receiving public assistance, §28-65-503.

**Standby guardians**, §28-65-221.**Sterilization.**

Decisions requiring court approval, §28-65-302.

**Substitution of guardian.**

Generally, §28-65-220.

**Temporary guardian.**

Appointment, §28-65-218.

**Termination of guardianship.**

Death of ward, §28-65-323.

Generally, §28-65-401.

**Uniform veterans' guardianship act.**

Applicability of provisions, §28-65-102.

General provisions, §§28-66-101 to 28-66-124.

**Venue.**

Actions by ward against guardian, §28-65-109.

Administration of ward's estate.

Action by ward for settlement of accounts, §28-65-109.

Appointment, §28-65-202.

**Veterans' guardianship act.**

Applicability of provisions, §28-65-102.

General provisions, §§28-66-101 to 28-66-124.

**Wards.**

Appraisal of ward's property, §28-65-321.

Care and custody of ward.

Application for payments, §28-65-309.

Discharge.

Generally, §28-65-402.

Death of ward.

Administration of estate, §28-65-323.

Funds of ward.

Authorized investments, §28-65-311.

Deposit, §28-65-311.

Distribution of ward's income, §28-65-310.

**GUARDIAN AND WARD —Cont'd****Wards —Cont'd**

Inquiry in continued incapacity of ward, §28-65-402.

**Investments.**

Authorized investments, §28-65-311.

Retention of property and investments by guardian, §28-65-312.

Property transactions on behalf of ward.

Retention of property and investments by guardian, §28-65-312.

Restoration of capacity.

Settlement of accounts, §28-65-402.

**Wills.**

Preferences in appointment of guardian.

Request in parent's will, §28-65-204.

Sale of ward's property.

Not an ademption, §28-24-102.

**H****HALF BLOOD.****Intestate succession**, §28-9-213.**HEARINGS.****Conservators for elderly and individuals with disabilities.**

Appointment of conservator.

Petition for appointment, §28-67-103.

Notice, §28-67-104.

**Guardians**, §28-65-211.**Probate proceedings.**

Petitions for probate and appointment of personal representatives.

Hearing on petition without notice, §28-40-109.

Notice of hearing on petitions, §28-40-110.

Request for special notice of hearings, §28-40-108.

**Veterans' guardianship act.**

Notice, §28-66-102.

**HEIRS.****Acknowledgments.**

Designation of heirs.

Declaration, §28-8-102.

**Claims against estates**, §§28-50-101 to 28-50-114.**Designation of heirs.**

Declaration, §28-8-102.

Acknowledgment, §28-8-102.

Recordation, §28-8-102.

**HEIRS —Cont'd****Recordation.**

Designation of heirs.

Declaration, §28-8-102.

**HOLOGRAPHIC WILLS, §28-25-104.****Probate of wills.**

Evidence, §28-40-117.

**HOMESTEADS.****Decedents' estates.**

General provisions, §§28-39-201 to 28-39-207.

**HOMICIDE.****Murder.**

Dower and curtesy.

Murder of spouse.

Effect on dower or curtesy,  
§28-11-204.**HOSPITALS AND OTHER HEALTH FACILITIES.****Guardians.**

Care, treatment and confinement of ward, §28-65-303.

**HUMAN SERVICES DEPARTMENT.****Aging and adult services division.**Public guardian for adults,  
§§28-65-701 to 28-65-707.**HUSBAND AND WIFE.****Decedents' estates.**

Disposition of community property.

Acts of married persons.

Severing or altering interests in property, §28-12-108.

**Presumptions.**

Legitimacy of child born or conceived during marriage, §28-9-209.

**I****IMMUNITY.****Decedents' estates.**

Accounts and accounting.

Executors and administrators,  
§28-52-101.

Autopsy records of deceased.

Release by healthcare provider to authorized persons, nonliability for, §28-1-119.

**Physicians and surgeons.**

Autopsy records of deceased.

Release by healthcare provider to authorized persons, nonliability for, §28-1-119.

**IMMUNITY —Cont'd****Power of attorney.**

Agent under.

Relief of agent from liability, agreement providing for,  
§28-68-115.**Trusts and trustees.**

Arkansas trust code.

Limitation of liability, §28-73-1010.

Persons dealing with trustee,  
§28-73-1012.

Public trusts.

Liability of trustee, §28-72-206.

**Wills.**

Probate of wills.

Custodian of will, §28-40-105.

**INCOME.****Decedents' estates.**

Distribution, §28-53-112.

**Principal and income act,**

§§28-70-101 to 28-70-606.

**INCOME TAX.****Decedents' estates.**

Surviving spouse.

Joint income tax refunds,  
§28-38-101.**Surviving spouse.**

Joint income tax refunds, §28-38-101.

**Uniform principal and income act.**Disbursements, allocation during administration of trust,  
§28-70-505.

Adjustments for taxes, §28-70-506.

**INCOMPETENCY.****Disclaimer of property interests,**

§28-2-216.

**Notice.**Service upon incompetent person,  
§28-1-112.**INDIGENT PERSONS.****Guardians, §28-65-503.****INHERITANCE CODE OF 1969.****Intestate succession, §§28-9-201 to 28-9-220.****INJUNCTIONS.****Trusts and trustees.**Breach of trust, remedies for,  
§28-73-1001.**Wills.**

Lost or destroyed wills.

Restraint of proceedings, §28-40-304.

**INSTITUTIONAL FUNDS.****Prudent management, §§28-69-801 to 28-69-810.**



**INSURANCE.****Powers of attorney.**

Authority granted under power,  
§28-68-210.

**INSURANCE POLICIES.**

**Uniform principal and income act,**  
§28-70-406.

**INTER-AMERICAN DEVELOPMENT BANK.****Fiduciaries.**

Obligations deemed legal investments,  
§28-69-205.

**INTEREST.****Decedents' estates.**

Distribution, §28-53-112.

**INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT.****Fiduciaries.**

Obligations deemed legal investments,  
§28-69-205.

**INTESTATE SUCCESSION.****Advancements, §28-9-216.**

Valuation of property, §28-9-216.

**Aliens, §28-9-211.****Ancestral estates.**

Distinction between ancestral estates  
and new acquisitions abolished,  
§28-9-219.

**Artificial insemination.**

Status of child for intestate succession  
purposes, §28-9-209.

Time for ascertainment of rights to  
inheritance or succession,  
§28-9-209.

**Citation of subchapter, §28-9-201.****Common law.**

Doctrine of first purchaser abolished,  
§28-9-218.

Male not preferred over female,  
§28-9-208.

**Consanguinity.**

Computing degrees of consanguinity,  
§28-9-212.

**Debts to decedent, §28-9-217.****Definitions.**

Descendants, §28-9-202.

Dying intestate, §28-9-202.

Heir, §28-9-203.

Intestate, §28-9-202.

Per capita, §28-9-204.

Per stirpes, §28-9-205.

**Descendants.**

Defined, §28-9-202.

**Disclaimer of property interests,**  
§§28-2-201 to 28-2-221.

**INTESTATE SUCCESSION —Cont'd**

**Dispensing with administration,**  
§§28-41-101 to 28-41-104.

**Doctrine of first purchaser.**

Abolished, §28-9-218.

**Dower and curtesy.**

Descent of land upon death of spouse,  
§28-11-102.

**Dying intestate.**

Defined, §28-9-202.

**Escheated estates.**

General provisions, §§28-13-101 to  
28-13-112.

Lack of person capable of inheriting,  
§28-9-215.

**Estate not passing under tables of  
descents, §28-9-215.**

**Failure of testamentary provisions,**  
§28-26-104.

**Female.**

Male not preferred over female,  
§28-9-208.

**First purchaser.**

Doctrine abolished, §28-9-218.

**Half blood.**

Kinsmen of the half blood, §28-9-213.

**Heirs.**

Computing degrees of consanguinity,  
§28-9-212.

Defined, §28-9-203.

Doctrine of first purchaser abolished,  
§28-9-218.

Interests transmissible by inheritance,  
§28-9-206.

Joint tenants and tenants in common.  
Heirs as tenants in common,  
§28-9-207.

**Legitimacy.**

Time for ascertainment of right of  
inheritance or succession,  
§28-9-209.

Posthumous heirs, §28-9-210.

Tables of descents, §28-9-214.

**Illegitimacy.**

Effect of illegitimacy on intestate  
succession, §28-9-209.

Minors, §28-9-209.

Presumption of legitimacy, §28-9-209.

**Interests transmissible by  
inheritance, §28-9-206.**

**Inter vivos conveyances to heirs or  
next of kin, §28-9-220.**

**Intestate.**

Defined, §28-9-202.

**Joint tenants and tenants in  
common.**

Heirs as tenants in common,  
§28-9-207.

**INTESTATE SUCCESSION —Cont'd**  
**Kinsmen of the half blood, §28-9-213.****Legitimacy.**

Presumption, §28-9-209.

Time for ascertainment of rights of inheritance or succession, §28-9-209.

**Male not preferred over female, §28-9-208.****Minors.**

Illegitimate children, §28-9-209.

Legitimate children.

Time for ascertainment of right of inheritance or succession, §28-9-209.

**New acquisitions.**

Distinction between ancestral estates and new acquisitions abolished, §28-9-219.

**Partial intestacy, §28-26-103.****Per capita.**

Defined, §28-9-204.

**Personal property, §28-9-203.**

Possession not necessary, §28-9-206.

**Per stirpes.**

Defined, §28-9-205.

**Possession.**

Not necessary, §28-9-206.

**Posthumous heirs, §28-9-210.****Presumptions.**

Legitimacy of child, §28-9-209.

**Probate code.**

Dispensing with administration, §§28-41-101 to 28-41-104.

**Procedure, §28-9-203.****Real property, §28-9-203.**

Possession not necessary, §28-9-206.

**Short title, §28-9-201.****Small estates.**

Dispensing with administration, §§28-41-101 to 28-41-104.

**Tables of descents, §28-9-214.**

Devolution where estate does not pass under tables of descents, §28-9-214.

**Testamentary conveyances to heirs or next of kin, §28-9-220.****Title of subchapter, §28-9-201.****Wills.**

Failure of testamentary provisions, §28-26-104.

Partial intestacy, §28-26-103.

**Worthier title.**

Doctrine abolished, §28-9-220.

**INVENTORY.****Decedents' estates, §28-49-110.**

Debt of executor, §28-49-111.

**INVENTORY —Cont'd****Decedents' estates —Cont'd**

Supplemental inventory, §28-49-110.

**Executors and administrators, §28-49-110.**

Debt of executor, §28-49-111.

Public administrators, §28-48-302.

Supplemental inventory, §28-49-110.

**INVESTMENTS.****Decedents' estates.**

Assets.

Investment of funds, §28-49-115.

**Executors and administrators.**

Prudent man rule for investments, §§28-71-101 to 28-71-107.

**Guardians.**

Prudent man rule for investments, §§28-71-101 to 28-71-107.

**Long-term intergenerational security trusts.**

When beneficiary may determine, §28-72-506.

**Prudent investor rule.**

Fiduciaries, §§28-71-101 to 28-71-107.

**Trusts and trustees.**

Prudent man rule for investments, §§28-71-101 to 28-71-107.

**Veterans' guardianship act,**

§28-66-113.

Common trust fund, §28-66-113.

Court order necessary, §28-66-113.

Exceptions, §28-66-113.

Prudent man rule for investments.

Uniform veterans' guardianship act not affected, §28-71-101.

**J****JOINT TENANTS AND TENANTS IN COMMON.****Disclaimer of property interests, §28-2-207.**

Delivery of disclaimer, §28-2-212.

**Intestate succession.**

Heirs as tenants in common, §28-9-207.

**Simultaneous death, §28-10-204.****Transfer on death security registration.**

Registration and beneficiary form, §28-14-102.

**JUDGMENTS AND DECREES.****Decedents' estates.**

Escheated estates, §§28-13-104, 28-13-107.



**JURISDICTION.**

**Adult guardianship and protective proceedings jurisdiction,**  
§§28-74-101 to 28-74-505.

**Conservators for elderly and individuals with disabilities,**  
§28-67-102.

**Mental health.**

Veterans' guardianship act.  
Jurisdiction over committed persons,  
§28-66-118.

**Missing persons.**

Administration of estates.  
Trusts and trustees, §28-72-101.

**Trusts and trustees.**

Arkansas trust code.  
Beneficiaries and trustees,  
jurisdiction over, §28-73-202.  
Subject-matter jurisdiction,  
§28-73-203.

**Veterans' guardianship act.**

Mental health.  
Jurisdiction over committed persons,  
§28-66-118.

**Wills.**

Construction of will, §28-26-101.  
Lost or destroyed wills, §28-40-301.

**L****LANDLORD AND TENANT.**

**Uniform principal and income act.**  
Rental property.  
Receipts from entities, §28-70-405.

**LEASES.****Dower and curtesy.**

Assignment of dower and curtesy.  
Oil and gas leases.  
Heirs to grant surviving spouse  
rights and leases, §28-39-302.

**Oil and gas.**

Guardian's powers and duties as to,  
§28-65-315.

**Trusts and trustees.**

Public trusts.  
Lease of property to trustee,  
§28-72-204.

**LETTERS OF GUARDIANSHIP,**

§§28-65-216, 28-65-217.

**LIENS.****Decedents' estates.**

Sale, mortgage, lease or exchange of  
property.  
Purchase by holder of lien,  
§28-51-107.  
Waiver of landlord's lien, §28-51-309.

**LIENS —Cont'd****Veterans' guardianship act.**

Purchaser at foreclosure of ward's lien,  
§28-66-115.

**Waiver.**

Landlord's liens.  
Decedents' estates.  
Waiver of lien, §28-51-309.

**LIFE INSURANCE.****Power of attorney.**

Authority granted under power,  
§28-68-210.

**LIMITATION OF ACTIONS.****Decedents' estates.**

Claims.  
Contingent claims, §28-50-110.  
Limitations on filing, §28-50-101.

**Trusts and trustees.**

Breach of trust.  
Actions against trustees,  
§28-73-1005.  
Revocable trusts.  
Proceedings to contest validity of  
trust, §28-73-604.

**LOANS.****Decedents' estates.**

Assets.  
Power to borrow money, §28-49-113.

**LONG-TERM****INTERGENERATIONAL**

**SECURITY TRUSTS, §§28-72-501**  
to 28-72-507.

**Agreement, §28-72-504.**

Copy filed with income tax return,  
§28-72-504.

**Beneficiaries.**

Age restrictions, §28-72-504.  
Control of investments, §28-72-506.  
Distribution on death, §28-72-507.

**Citation of act.**

Short title, §28-72-501.

**Contributions.**

Limitation, §28-72-504.

**Defined, §28-72-503.****Distributions.**

Death of beneficiary, §28-72-507.  
Limitation, §28-72-504.  
Notice to department of finance and  
administration, §28-72-504.  
Taxes and penalties, §28-72-505.

**Gross income, defined, §28-72-503.****Investments.**

When beneficiary may determine,  
§28-72-506.

**Legislative intent, §28-72-502.**

**LONG-TERM****INTERGENERATIONAL  
SECURITY TRUSTS —Cont'd****Notice.**

Distributions from trust.

Notice to department of finance and  
administration, §28-72-504.

**Penalties.**

Distributions in violation of chapter, -  
§28-72-505.

**Purpose of act,** §28-72-502.

**Short title,** §28-72-501.

**Taxation.**

Copy of agreement filed with income  
tax return, §28-72-504.

Distributions from trust, §28-72-505.

Income tax.

Copy of agreement filed with return,  
§28-72-504.

Penalty on distributions in violation of  
provisions, §28-72-505.

**Trustee,** §28-72-504.

**LOYALTY.**

**Trustees,** §28-73-802.

**M****MAIL.****Certified mail.**

Probate proceedings.

Use of certified mail authorized,  
§28-1-117.

**Probate proceedings.**

Registered or certified mail authorized,  
§28-1-117.

**Registered mail.**

Probate proceedings.

Use of registered mail authorized,  
§28-1-117.

**MANAGEMENT OF  
INSTITUTIONAL FUNDS,  
§§28-69-801 to 28-69-810.****MAPS AND PLATS.****Decedents' estates.**

Real property.

Sale, mortgage, lease or exchange.

Platting and dedication,  
§28-51-308.

**MARRIAGE.****Presumptions.**

Legitimacy of child born or conceived  
during marriage, §28-9-209.

**Wills.**

Revocation by change in  
circumstances, §28-25-109.

**MENTAL HEALTH.****Department of veterans affairs.**

Commitment to department of  
veterans affairs and certain other  
federal hospitals.

Veterans' guardianship provisions,  
§28-66-118.

**Dower and curtesy.**

Assignment of dower and curtesy.

Defense when action against  
incompetent persons,  
§28-39-303.

**Executors and administrators.**

Incompetency of personal  
representative, §28-48-106.

When personal representative may be  
removed, §28-48-105.

**Guardians.**

Incapacitated persons, §§28-65-101 to  
28-65-604.

**Incapacitated persons.**

Guardians, §§28-65-101 to 28-65-604.

**Jurisdiction.**

Veterans' guardianship act.

Jurisdiction over committed persons,  
§28-66-118.

**Veterans' guardianship act.**

Certificate of competency, §28-66-117.

Commitment to department of  
veterans affairs or other United  
States government agency,  
§28-66-118.

General provisions, §§28-66-101 to  
28-66-124.

Guardians for mentally incompetent.

Certificates of public convenience  
and necessity, §28-66-107.

Jurisdiction over person committed,  
§28-66-118.

Out of state commitment, §28-66-118.

Transfer of committed persons,  
§28-66-118.

**MILITARY.****Guardians.**

Veterans' guardianship act,  
§§28-66-101 to 28-66-124.

**Veterans' guardianship act,**

§§28-66-101 to 28-66-124.

**MINES AND MINERALS.****Dower and curtesy.**

Money or royalties received,  
§28-11-304.

**Uniform principal and income act.**

Receipts normally apportioned,  
§28-70-409.



**MISCARRIAGES.****Decedents' estates.**

Deceased viable fetus.

Jurisdiction, §28-1-118.

**MISSING PERSONS.****Administration of estates.**

Trusts and trustees.

Appointment of trustee, §28-72-102.

Bonds, surety, §28-72-104.

Jurisdiction, §28-72-101.

Powers and duties of trustee,

§28-72-103.

**Bonds, surety.**

Administration of estates.

Trusts and trustees, §28-72-104.

**Jurisdiction.**

Administration of estates.

Trusts and trustees, §28-72-101.

**Probate code.**

Search for alleged decedent,

§28-40-112.

**Trusts and trustees.**

Administration of estates.

Appointment of trustee, §28-72-102.

Bonds, surety, §28-72-104.

Jurisdiction, §28-72-101.

Powers and duties of trustee,

§28-72-103.

**Wills.**

Probate of wills.

Search for alleged decedent,

§28-40-112.

**MISTAKE OR ERROR.****Trusts and trustees.**

Arkansas trust code.

Reformation to correct mistakes,

§28-73-415.

**MORTGAGES AND DEEDS OF TRUST.****Decedents' estates.**

Assets.

Disposition of mortgaged property,

§28-49-108.

Power to mortgage property,

§28-49-113.

**Dower and curtesy.**

Lands held by way of mortgage.

No dower or curtesy interest,

§28-11-303.

Mortgaged land, §28-11-303.

Purchase money mortgages.

Extent of dower or curtesy in land,

§28-11-303.

Sale of land by mortgagee.

Right to dower or curtesy in surplus,

§28-11-303.

**MURDER.****Dower and curtesy.**

Murder of spouse.

Effect on dower or curtesy,

§28-11-204.

**N****NONRESIDENTS.****Executors and administrators.**

Ancillary administration.

General provisions, §§28-42-101 to

28-42-111.

**Guardians.**

Qualifications, §28-65-203.

**Wills.**

Probate of nonresident's will,

§28-40-120.

**NOTES.****Dower and curtesy, §28-11-306.****NOTICE.****Adult guardianship and protective proceedings jurisdiction.**

Notice of petition, §28-74-208.

**Appraisals and appraisers.**

Decedents' estates.

Homesteads.

Contest of commissioner's report,

§28-39-205.

**Auctions and auctioneers.**

Decedents' estates.

Escheated estates.

Sale of real estate, §28-13-109.

**Conservators for elderly and individuals with disabilities,**

§28-67-104.

Discharge of conservator, §28-67-109.

Hearings, §28-67-104.

**Decedents' estates.**

Accounts and accounting.

Filing of accounts, §28-52-106.

Appointment of personal

representatives.

Creditors of estate to be notified,

§28-40-111.

Escheated estates.

Sale of real estate, §28-13-109.

Scire facias.

Order for appearance.

Publication of notice,

§28-13-106.

Homesteads.

Appraisals and appraisers.

Contest of commissioner's report,

§28-39-205.

Value exceeding limit.

Sale of land, §28-39-204.

**NOTICE —Cont'd****Dower and curtesy.**

- Assignment of dower and curtesy.
- Surviving spouses petitioned for allotment, §28-39-303.

**Executors and administrators.**

- Ancillary administration.
- Application for ancillary letters, §28-42-102.

- Nonresident to designate agent to receive notice, §28-42-104.

- Appointment, §28-40-111.

**Guardians.**

- Appointment of guardian.
- Hearing, §§28-65-207 to 28-65-209.

**Incompetent persons.**

- Service upon incompetent person, §28-1-112.

**Long-term intergenerational security trusts.**

- Distributions from trust.
- Notice to department of finance and administration, §28-72-504.

**Probate code.**

- Petitions for probate and appointment of personal representative, §§28-40-108 to 28-40-111.

**Simultaneous death act.**

- Third party liability.
- Notice of lack of entitlement, §28-10-207.

**Trusts and trustees.**

- Arkansas trust code.
- Methods of notice, §28-73-109.
- Transfer of principal place of administration, §28-73-108.

**Veterans' guardianship act.**

- Accounts and accounting.
- Hearings on accounts, §28-66-110.
- Appointment of guardians.
- Filing of petition, §28-66-108.
- Hearings, §28-66-102.

**Wills.**

- Appointment of personal representative.
- Creditor to be notified, §28-40-111.
- Taking against will, §28-39-402.

**NURSES.****Social services.**

- Decedents' estates.
- Claims for reimbursement for nursing care, §28-13-103.

**O****OATHS OR AFFIRMATIONS.****Appraisals and appraisers.**

- Decedents' estates.
- Homesteads.
- Oath of commissioners, §28-39-203.

**OATHS OR AFFIRMATIONS —Cont'd**  
**Decedents' estates.**

- Homesteads.
- Appraisals and appraisers.
- Oath of commissioners, §28-39-203.

**OIL AND GAS.****Dower and curtesy.**

- Assignment of dower and curtesy.
- Oil and gas leases.
- Heirs to grant surviving spouse rights in leases, §28-39-302.
- Surviving spouse entitled to royalty payments, §28-39-302.
- Money or royalties received, §28-11-304.
- Payment to surviving spouse, §28-11-304.
- Payment to surviving spouse, §28-11-304.
- Purchasers or lessees to withhold payments until rights of surviving spouse determined, §28-11-304.

**Guardians.**

- Lease, sale, etc., §28-65-315.
- Operation and development.
- Agreements, §28-65-316.

**Lease of oil, gas and mineral interests.**

- Guardian's powers and duties as to, §28-65-315.

**ORDERS.****Circuit courts.**

- Probate proceedings.
- Modification or vacation of orders, §28-1-115.

**Dower and curtesy.**

- Assignment of dower and curtesy.
- Order for allotment, §28-39-303.

**Social services.**

- Decedents' estates.
- Claims.
- Reimbursement for nursing care, §28-13-103.

**Veterans' guardianship act.**

- Investments, §28-66-113.
- Purchase of real property.
- Order of court required, §28-66-115.

**P****PARENTAGE PROCEEDINGS.****Intestate succession.**

- Effect of illegitimacy on intestate succession, §28-9-209.
- Minors, §28-9-209.



**PARENT AND CHILD.****Guardians.**

Dispensing with guardianship,  
§28-65-501.

Termination of parental rights.

Decisions of guardian requiring  
court approval, §28-65-302.

**Intestate succession.**

Legitimacy of child.

Effect, §28-9-209.

Presumption, §28-9-209.

**Minor children.**

Responsibility for care, maintenance  
and education.

Generally, §28-65-310.

**PARTIES.****Veterans' guardianship act.**

Administrator of veterans' affairs.

Interested party, §28-66-102.

**Wills.**

Probate of wills.

Ante-mortem probate act,  
§28-40-202.

**PARTNERSHIPS.****Trusts and trustees.**

Interest of trustee as general partner,  
§28-73-1011.

**PERSONAL PROPERTY.****Community property.**

Decedents' estates.

Disposition of community property,  
§§28-12-101 to 28-12-113.

**Decedents' estates.**

Community property.

Disposition of community property,  
§§28-12-101 to 28-12-113.

Disclaimer of property interests,  
§§28-2-201 to 28-2-221.

**Disclaimer of property interests,**

§§28-2-201 to 28-2-221.

**Dower and curtesy, §28-11-305.****Intestate succession, §28-9-203.**

Possession not necessary, §28-9-206.

**Power of attorney.**

Tangible personal property, grant of  
general authority, §28-68-205.

**Wills.**

Dispositions by extraneous writings,  
§28-25-107.

**PETITIONS.****Adult guardianship and protective proceedings jurisdiction.**

Notice of petition, §28-74-208.

Transfer of guardianship or  
conservatorship to another state,  
§28-74-301.

**PETITIONS —Cont'd****Conservators for elderly and individuals with disabilities.**

Appointment of conservator,  
§28-67-103.

**Decedents' estates.**

Accounts and accounting.

Petition for settlement and  
distribution.

Account to include, §28-52-105.

Dispensing with administration.

Petition for no administration,  
§28-41-103.

**Guardians.**

Appointment of guardians,  
§§28-65-205, 28-65-206.

Foreign guardians.

Petition to act in Arkansas,  
§§28-65-601, 28-65-602.

Public guardian for adults.

Petition for appointment as  
guardian, §28-65-703.

**Power of attorney.**

Court review of agent's conduct,  
petition for, §28-68-116.

**Veterans' guardianship act.**

Appointment of guardians, §28-66-105.

Contents, §28-66-105.

Rating of incompetency, §28-66-105.

**PHYSICIANS AND SURGEONS.****Decedents' estates.**

Autopsy records of deceased.

Release by healthcare provider to  
authorized persons, nonliability  
for, §28-1-119.

**Immunity.**

Autopsy records of deceased.

Release by healthcare provider to  
authorized persons, nonliability  
for, §28-1-119.

**PLEADINGS.****Decedents' estates.**

Escheated estates.

Denial of title in county.

Failure to appear or plead,  
§28-13-107.

Time for pleadings, §28-13-106.

**Dower and curtesy.**

Assignment of dower and curtesy.

Formal pleadings unnecessary,  
§28-39-303.

No verification of pleadings  
required, §28-39-303.

**POSTHUMOUS HEIRS.**

Intestate secession, §28-9-210.

**POUR-OVERS.**

**Testamentary additions to trusts,**  
§§28-27-101 to 28-27-106.

**POWER OF ATTORNEY, §§28-68-101**  
to 28-68-405.

**Acceptance of power of attorney and**  
**reliance on, §28-68-119.**

Refusal to accept acknowledged  
statutory form, §28-68-120.

**Agent under.**

Acceptance of appointment,  
§28-68-113.

Breach of fiduciary duty by another  
agent.

Liability for failure to notify  
principal, §28-68-111.

Certification, form, §28-68-302.

Coagents, §28-68-111.

Compensation and reimbursement,  
§28-68-112.

Court review of agent's conduct,  
petition for, §28-68-116.

Duties upon appointment, §28-68-114.

Liability for violations, §28-68-117.

Relief of agent from liability,  
agreement providing for,  
§28-68-115.

Resignation, §28-68-118.

Standards agent held to, §28-68-114.

Successor agents, §28-68-111.

Termination of agent's authority,  
§28-68-110.

**Applicability of uniform act,**  
§28-68-103.

Uniform application, §28-68-401.

**Attorneys at law.**

Opinion of counsel, reliance on as to  
acceptance of power, §28-68-119.

**Authority granted under power.**

Banks and financial institutions,  
§28-68-208.

Business or entity, operation of,  
§28-68-209.

Claims and litigation, §28-68-212.

Commodities and options, §28-68-207.

Conservatorships, guardianships or  
custodianships, §28-68-211.

Construction of authority, §28-68-203.

Estates and trusts, §28-68-211.

General authority, §28-68-201.

Gifts, §28-68-217.

Governmental or civil or military  
service, benefits from, §28-68-214.

Incorporation of authority, §28-68-202.

Insurance and annuities, §28-68-210.

Personal and family maintenance,  
§28-68-213.

**POWER OF ATTORNEY —Cont'd**

**Authority granted under power**  
—Cont'd

Real property, §28-68-204.

Real property, general authority with  
respect to, §28-68-204.

Retirement benefits or deferred  
compensation, §28-68-215.

Stocks and bonds, §28-68-206.

Tangible personal property,  
§28-68-205.

Taxes, §28-68-216.

**Banks.**

Authority granted under power,  
§28-68-208.

**Breach of fiduciary duty by another**  
**agent.**

Liability for failure to notify principal,  
§28-68-111.

**Business or entity, operation of.**

Authority granted, §28-68-209.

**Commodities and options, general**  
**authority with respect to,**  
§28-68-207.

**Conflict of laws.**

Financial institutions and other  
entities, laws applicable to,  
§28-68-122.

**Conservatorships, guardianships or**  
**custodianships.**

Authority granted under power,  
§28-68-211.

**Construction and interpretation,**  
§28-68-107.

Act provisions, construction of,  
§28-68-401.

Authority granted under power,  
§28-68-203.

Electronic signatures in global and  
national commerce, relation to,  
§28-68-402.

Existing powers, effect of uniform act  
on, §28-68-403.

Principles of law and equity  
applicable, §28-68-121.

Remedies under other laws applicable,  
§28-68-123.

**Definitions, §28-68-102.**

**Durable powers of attorney.**

Power considered as, §28-68-104.

**Effective date of power, §28-68-109.**

**Effective date of uniform act,**  
§28-68-405.

**Electronic signatures in global and**  
**national commerce, relation to,**  
§28-68-402.

**English translation, reliance on,**  
§28-68-119.



**POWER OF ATTORNEY —Cont'd**

**Exceptions from uniform act,**  
§28-68-103.

**Execution, §28-68-105.**

Validity, §28-68-106.

When power effective, §28-68-109.

**Existing powers, effect of uniform act on, §28-68-403.**

**Financial institutions and other entities, laws applicable to.**

Conflict of laws, §28-68-122.

**Forms.**

Agent's certification, §28-68-302.

Statutory form, §28-68-301.

**Gifts.**

Authority granted under power,  
§28-68-217.

**Governmental or civil or military service, benefits from.**

Authority granted under power,  
§28-68-214.

**Guardian for estate or person.**

Authority granted under power.

Conservatorships, guardianships or custodianships, §28-68-211.

Court appointment, §28-68-108.

Nomination through power of attorney, §28-68-108.

**Insurance.**

Authority granted under power,  
§28-68-210.

**Judicial relief.**

Review of agent's conduct or construction of power, §28-68-116.

**Life insurance and annuities.**

Authority granted under power,  
§28-68-210.

**Meaning and effect, §28-68-107.**

**Personal and family maintenance.**

Authority granted under power,  
§28-68-213.

**Personal property.**

Authority granted under power regarding tangible personal property, §28-68-205.

**Principles of law and equity applicable to act, §28-68-121.**

**Real property, general authority with respect to, §28-68-204.**

**Reliance on power of attorney, §28-68-119.**

**Remedies under other laws applicable, §28-68-123.**

**Retirement benefits or deferred compensation.**

Authority granted under power,  
§28-68-215.

**POWER OF ATTORNEY —Cont'd**

**Revocation of power.**

Subsequent power executed,  
§28-68-110.

**Signatures, §28-68-105.**

**Statutory form, §28-68-301.**

Refusal to accept acknowledged statutory form, §28-68-120.

**Stocks and bonds, general authority with respect to, §28-68-206.**

**Taxation.**

Authority granted under power,  
§28-68-216.

**Termination, §28-68-110.**

**Title of uniform act, §28-68-101.**

**Trusts and estates.**

Authority granted under power,  
§28-68-211.

**Uniform act, §§28-68-101 to 28-68-405.**

**Validity, §28-68-106.**

**When power effective, §28-68-109.**

**POWERS OF APPOINTMENT.**

**Disclaimer of property interests,**  
§28-2-209.

Delivery of disclaimer, §28-2-212.

When effective, §28-2-210.

**PRESUMPTIONS.**

**Decedents' estates.**

Disposition of community property.

Rebuttable presumptions,  
§28-12-102.

**Guardians.**

Incapacitated persons not presumed incompetent, §28-65-106.

**Husband and wife.**

Legitimacy of child born or conceived during marriage, §28-9-209.

**Intestate succession.**

Legitimacy of child, §28-9-209.

**Legitimacy of child, §28-9-209.**

**Marriage.**

Legitimacy of child born or conceived during marriage, §28-9-209.

**Power of attorney.**

Signature presumed to be genuine,  
§28-68-105.

**PRETERMITTED CHILDREN.**

**Wills.**

Taking against will.

Rights, §28-39-407.

**PRINCIPAL AND INCOME ACT,**

§§28-70-101 to 28-70-606.

**Adjustments, §28-70-104.**

**Annuities.**

Receipts normally apportioned,  
§28-70-409.

**PRINCIPAL AND INCOME ACT**

—Cont'd

**Application of provisions, §28-70-601.**Existing trusts and estates,  
§28-70-605.Transition for certain existing trusts,  
§28-70-606.**Apportionment at beginning and  
end of income interest,**  
§§28-70-301 to 28-70-303.Receipts and disbursements,  
§28-70-302.When income interest ends,  
§28-70-303.When right to income begins and ends,  
§28-70-301.**Asset-backed securities.**Receipts normally apportioned,  
§28-70-415.**Beneficiaries.**Determination and distribution of net  
income, §§28-70-201, 28-70-202.**Construction of provisions,**  
§28-70-601.**Contracts naming trust or trustee as  
beneficiary.**Receipts not normally apportioned,  
§28-70-407.**Deferred compensation.**Receipts normally apportioned,  
§28-70-409.**Definitions, §28-70-102.**

Asset-backed securities, §28-70-415.

Derivative, §28-70-414.

Entity, §28-70-401.

**Derivatives.**Receipts normally apportioned,  
§28-70-414.**Determination and distribution of  
net income, §§28-70-201,  
28-70-202.****Disbursements, allocation during  
administration of trust,**  
§§28-70-501 to 28-70-506.

Income, §28-70-501.

Adjustments for taxes, §28-70-506.

Transfers for depreciation,  
§28-70-503.Transfers to reimburse principal,  
§28-70-504.

Income taxes, §28-70-505.

Adjustments for taxes, §28-70-506.

Principal, §28-70-502.

Adjustments for taxes, §28-70-506.

Transfers for depreciation,  
§28-70-503.Transfers to reimburse principal,  
§28-70-504.**PRINCIPAL AND INCOME ACT**

—Cont'd

**Effective date, §28-70-604.****Existing trusts and estates,**  
§28-70-605.**Fiduciary duties, §28-70-103.****Generally, §28-70-103.****Income.**Determination and distribution,  
§§28-70-201, 28-70-202.Disbursements, allocation during  
administration of trust,  
§28-70-501.

Adjustments for taxes, §28-70-506.

Transfers for depreciation,  
§28-70-503.Transfers to reimburse principal,  
§28-70-504.**Income taxes.**Disbursements, allocation during  
administration of trust,  
§28-70-505.

Adjustments for taxes, §28-70-506.

**Insubstantial allocations not  
required.**Receipts normally apportioned,  
§28-70-408.**Insurance policies.**Receipts not normally apportioned,  
§28-70-406.**Interest.**Apportionment at beginning and end  
of income interest, §§28-70-301 to  
28-70-303.**Liquidating asset.**Receipts normally apportioned,  
§28-70-410.**Minerals.**Receipts normally apportioned,  
§28-70-411.**Natural resources.**Receipts normally apportioned,  
§28-70-411.**Obligation to pay money.**Receipts not normally apportioned,  
§28-70-406.**Options.**Receipts normally apportioned,  
§28-70-414.**Powers.**

Adjustments, §28-70-104.

**Principal.**Disbursements, allocation during  
administration of trust,  
§28-70-502.

Adjustments for taxes, §28-70-506.

Transfers for depreciation,  
§28-70-503.



**PRINCIPAL AND INCOME ACT**

—Cont'd

**Principal —Cont'd**

Disbursements, allocation during  
administration of trust —Cont'd  
Transfers to reimburse principal,  
§28-70-504.

**Principal receipts.**

Receipts not normally apportioned,  
§28-70-404.

**Property not productive of income.**

Receipts normally apportioned,  
§28-70-413.

**Receipts.**

From entities, §§28-70-401 to  
28-70-403.

Activities conducted by trustee,  
§28-70-403.

Character of receipts, §28-70-401.

Distribution from trust or estate,  
§28-70-402.

Normally apportioned, §§28-70-408 to  
28-70-415.

Annuities, §28-70-409.

Asset-backed securities, §28-70-415.

Deferred compensation, §28-70-409.

Derivatives, §28-70-414.

Insubstantial allocations not  
required, §28-70-408.

Liquidating asset, §28-70-410.

Minerals, §28-70-411.

Natural resources, §28-70-411.

Options, §28-70-414.

Property not productive of income,  
§28-70-413.

Timber, §28-70-412.

Water, §28-70-411.

Not normally apportioned, §§28-70-404  
to 28-70-407.

Contracts naming trust or trustee as  
beneficiary, §28-70-407.

Insurance policies, §28-70-406.

Obligation to pay money,  
§28-70-406.

Principal receipts, §28-70-404.

Rental property, §28-70-405.

**Rental property.**

Receipts not normally apportioned,  
§28-70-405.

**Residuary and remainder  
beneficiaries.**

Distribution of net income, §28-70-202.

**Separate fund, payments from.**

Allocation, §28-70-409.

**Severability, §28-70-602.****Short title, §28-70-101.****Terminating income interests,  
§§28-70-201, 28-70-202.****PRINCIPAL AND INCOME ACT**

—Cont'd

**Timber.**

Receipts normally apportioned,  
§28-70-412.

**Title, §28-70-101.****Transition for certain existing  
trusts, §28-70-606.****Water.**

Receipts normally apportioned,  
§28-70-411.

**PRISONS AND PRISONERS.****Estates.**

Persons imprisoned in foreign  
countries, §§28-72-101 to  
28-72-104.

**Foreign countries.**

Estates of persons imprisoned in  
foreign country, §§28-72-101 to  
28-72-104.

**PROBATE.****Administrators.**

General provisions, §§28-48-101 to  
28-48-305.

**Allowances.**

Decedents' estates, §§28-39-101 to  
28-39-105.

**Certificate of probate, §28-40-122.****Character of proceedings, §28-40-101.****Citation of act, §28-1-101.****Definitions, §28-1-102.****Disclaimer of property interests,  
§§28-2-201 to 28-2-221.****Dispensing with administration.**

Decedents' estates, §§28-41-101 to  
28-41-104.

**Effective date, §28-1-103.****Effect of code, §28-1-103.****Forms.**

Official probate forms, Probate Law  
Appx (Title 28).

**Guardians, §§28-65-101 to 28-65-604.****Public administrators, §§28-48-301 to  
28-48-305.****Rights not affected, §28-1-103.****Small estates.**

Dispensing with administration,  
§§28-41-101 to 28-41-104.

**Surviving spouses.**

Allowances, §§28-39-101 to 28-39-105.

**Title of act, §28-1-101.****Use of terms, §28-1-102.****Venue, §28-40-102.****PROPERTY.****Wills.**

Will to operate on after-acquired  
property, §28-26-102.

**PROSECUTING ATTORNEYS.****Decedents' estates.**

Escheated estates.

Duties, §§28-13-105, 28-13-106.

**Escheated estates.**

Duties, §§28-13-105, 28-13-106.

**PRUDENT INVESTOR RULE.****Fiduciaries**, §§28-71-101 to 28-71-107.**Trustees.**

Uniform prudent investor act,

§§28-73-901 to 28-73-908.

**PRUDENT MANAGEMENT OF  
INSTITUTIONAL FUNDS,**

§§28-69-801 to 28-69-810.

**Applicability to existing****institutional funds**, §28-69-808.**Appropriation for expenditure or  
accumulation of endowment  
fund**, §28-69-804.**Compliance review**, §28-69-807.**Construction and interpretation of  
provisions**, §28-69-810.**Construction of gift instruments**,  
§28-69-804.**Definitions**, §28-69-802.**Delegation of management and  
investment**, §28-69-805.**Electronic signatures in global and  
national commerce act, relation  
to**, §28-69-809.**Restrictions, release or modification**,  
§28-69-806.**Short title**, §28-69-801.**Standard of conduct**, §28-69-803.**PUBLICATION.****Decedents' estates.**

Escheated estates.

Scire facias.

Order for appearance, §28-13-106.

**PUBLIC TRUSTS.****General provisions**, §§28-72-201 to  
28-72-207.**R****REAL PROPERTY.****Community property.****Decedents' estates.**

Disposition of community property,

§§28-12-101 to 28-12-113.

**Conveyances.****Dower and curtesy.**Conveyance to spouse or in trust for  
spouse in lieu of, §28-11-401.**REAL PROPERTY —Cont'd****Damages.****Dower and curtesy.**

Assignment of dower and curtesy.

Recovery of dower and curtesy  
lands deforced from surviving  
spouse possession, §28-39-309.**Decedents' estates.**

Disclaimer of property interests,

§§28-2-201 to 28-2-221.

Homesteads, §§28-39-201 to 28-39-207.

**Disclaimer of property interests**,  
§§28-2-201 to 28-2-221.**Dower and curtesy.**

Assignment of dower and curtesy.

Land alienated by heir.

Rights of surviving spouse,  
§28-39-307.Recovery of dower or curtesy lands  
deforced from surviving spouse  
possession, §28-39-309.

Damages, §28-39-309.

Rental of lands where indivisible,  
§28-39-305.

Sale of property, §28-39-306.

Payment from proceeds,  
§28-39-306.Conveyance of land to spouse or in  
trust for spouse in lieu of dower or  
curtesy, §28-11-401.

Assent of spouse, §28-11-401.

Exchange of lands, §28-11-302.

Jointure in lieu of dower or curtesy,  
§28-11-401.

Assent of spouse, §28-11-401.

Forfeiture, §28-11-405.

Without assent of spouse,  
§28-11-402.

Lands generally, §28-11-301.

Lands held by way of mortgage.

No dower or curtesy interest,  
§28-11-303.

Mortgaged land, §28-11-303.

Purchase money mortgages,  
§28-11-303.Pecuniary provision in lieu of dower or  
curtesy in land, §28-11-401.

Election, §28-11-402.

Forfeiture, §28-11-405.

Purchase money mortgages.

Extent of interest in land,  
§28-11-303.

Sale of land by mortgagee.

Right to dower or curtesy in surplus,  
§28-11-303.**Wills.**Provision in will in lieu of dower or  
curtesy in lands, §28-11-403.



**REAL PROPERTY —Cont'd****Homesteads.**

Decedents' estates, §§28-39-201 to 28-39-207.

**Intestate succession, §28-9-203.**

Possession not necessary, §28-9-206.

**Mortgages and deeds of trust.**

Dower and curtesy, §28-11-303.

**Power of attorney.**

General authority with respect to real property, §28-68-204.

**Veterans' guardianship act.**

Partition of land, §28-66-115.

Purchase of home for ward, §28-66-115.

Evidence of value and title, §28-66-115.

Order of court required, §28-66-115.

Purchaser at foreclosure of ward's lien, §28-66-115.

**Wills.**

Dower and curtesy.

Provisions in lieu of dower or curtesy in lands, §28-11-403.

**RECEIPTS.****Principal and income act,**

§§28-70-401 to 28-70-506.

**RECEIVERS.****Fiduciaries.**

Definition of fiduciary to include receiver, §28-69-201.

**RECORDATION OF DOCUMENTS.****Decedents' estates.**

Designation of heirs.

Declaration, §28-8-102.

Escheated estates.

Writ for seizure of real property.

Return of writ, §28-13-108.

Homesteads.

Entry of reservation by clerk, §28-39-202.

Real property.

Sale, mortgage, lease or exchange, §28-51-306.

**Disclaimer of property interests.**

Real property interest, §28-2-215.

**Dower and curtesy.**

Assignment of dower and curtesy.

Acceptance of assignment, §28-39-301.

**Heirs.**

Designation of heirs.

Declaration, §28-8-102.

**Wills.**

Recording in other counties, §28-40-123.

**RECORDS.****Veterans' guardianship act.**

Copies.

Furnished without charge, §28-66-116.

**Wills.**

Lost or destroyed wills.

Decree of establishment, §28-40-303.

**REFEREES.****Probate proceedings.**

Circuit courts, §28-1-106.

**REGISTERED MAIL.****Probate proceedings.**

Use of registered mail authorized, §28-1-117.

**REGISTRATION.****Adult guardianship and protective proceedings jurisdiction.**

Registration of guardianship orders, §28-74-401.

Registration of protective orders, §28-74-402.

**Securities.**

Transfer on death registration, §§28-14-101 to 28-14-112.

**RENT.****Decedents' estates.**

Allowances.

Surviving spouses.

Allowance paid surviving spouse out of rent.

Until apportionment of dower or curtesy, §28-39-104.

Freedom from rent, §§28-39-102, 28-39-103.

**Dower and curtesy.**

Assignment of dower and curtesy.

Rental of lands where indivisible, §28-39-305.

**RENUNCIATION.****Disclaimer of property interests,**

§§28-2-201 to 28-2-221.

**REPORTS.****Decedents' estates.**

Homesteads.

Appraisals and appraisers.

Contest of commissioner's report, §28-39-205.

Sheriffs.

Sale of land, §28-39-204.

Sale, mortgage, lease or exchange of real property, §28-51-305.

**Dower and curtesy.**

Assignment of dower and curtesy.

Commissioner's reports, §28-39-304.

Confirmation or correction, §28-39-304.

**REPORTS —Cont'd****Dower and curtesy —Cont'd**

Assignment of dower and curtesy  
—Cont'd

Commissioner's reports —Cont'd

Effect of approval, §28-39-304.

**Guardians, §§28-65-301, 28-65-322.**

**Sheriffs.**

Decedents' estates.

Homesteads.

Sale of lands, §28-39-204.

**RETIREMENT.**

**Long-term intergenerational security trusts, §§28-72-501 to 28-72-507.**

**Power of attorney.**

Authority granted under power.

Retirement benefits or deferred compensation, §28-68-215.

**Spendthrift trusts.**

Retirement plan.

Prohibition against alienation and attachment.

Presumed to be spendthrift trust, §28-69-501.

**Trusts and trustees.**

Long-term intergenerational security trusts, §§28-72-501 to 28-72-507.

**ROYALTIES.****Dower and curtesy.**

Assignment of dower and curtesy.

Oil and gas leases.

Surviving spouse entitled to royalty payments, §28-39-302.

Payments to surviving spouse, §28-11-304.

Sale of timber, oil, gas or mineral leases, §28-11-304.

Timber, oil, gas or mineral leases, §28-11-304.

Withholding payments until rights of surviving spouse determined, §28-11-304.

**S****SALES.****Decedents' estates.**

Homestead.

Value exceeding limit.

Sale of land, §28-39-204.

**Escheats.**

Escheated estates.

Real property, §28-13-109.

**SCIRE FACIAS.****Decedents' estates.**

Escheated estates.

Issuance against claimants, §28-13-106.

Order for appearance, §28-13-106.

Publication of notice, §28-13-106.

Service of process, §28-13-106.

**Service of process.**

Decedents' estates.

Escheated estates, §28-13-106.

**SECURITIES.****Registration.**

Transfer on death registration, §§28-14-101 to 28-14-112.

**Transfer on death registration.**

Applicable law, §28-14-103.

Application of act, §28-14-112.

Construction of chapter, §28-14-111.

Definitions, §28-14-101.

Effect, §28-14-106.

Forms, §§28-14-105, 28-14-110.

Joint tenancy ownership, §28-14-102.

Nontestamentary transfer on death, §28-14-109.

Origination, §28-14-104.

Ownership on death of owner, §28-14-107.

Protection of registering entity, §28-14-108.

Short title, §28-14-111.

Sole ownership, §28-14-102.

Terms and conditions, §28-14-110.

**SENIOR CITIZENS.**

**Conservators for elderly and individuals with disabilities,**  
§§28-67-101 to 28-67-111.

**SERVICE OF NOTICE, PROCESS AND OTHER PAPERS.****Dower and curtesy.**

Assignment of dower and curtesy.

Constructive service, §28-39-303.

**Guardians.**

Actions against guardian, §28-65-305.

**Scire facias.**

Decedents' estates.

Escheated estates, §28-13-106.

**Wills.**

Probate of wills.

Ante-mortem probate act, §28-40-202.



**SETTLEMENT.****Decedents' estates.**

- Accounts and accounting.
- Petition for settlement and distribution.
- Account to include, §28-52-105.
- Assets, §28-49-104.
- Claims, §28-50-112.

**Guardians.**

- Claims against estate, §28-65-318.
- Decisions requiring court approval, §28-65-302.

**Trusts and trustees.**

- Nonjudicial settlement agreements, §28-73-111.

**SHERIFFS.****Decedents' estates.**

- Escheated estates.
- Sale of real property.
- Fees, §28-13-109.
- Homesteads.
- Value exceeding limit.
- Sale of land.
- Report of sheriff, §28-39-204.

**Executors and administrators.**

- Public administrators.
- Designation as public administrator, §28-48-301.
- Expiration of sheriff's term, §28-48-305.
- General provisions, §§28-48-301 to 28-48-305.

**Public administrators.**

- Designation of sheriff as public administrator, §28-48-301.
- Expiration of sheriff's term, §28-48-305.
- General provisions, §§28-48-301 to 28-48-305.

**Reports.**

- Decedents' estates.
- Homesteads.
- Sale of lands, §28-39-204.

**SIGNATURES.****Power of attorney, §28-68-105.****SIMULTANEOUS DEATH.****Applicability of provisions.**

- Inapplicable when governing instrument provides otherwise, §28-10-206.
- Uniformity of application, §28-10-208.
- Citation of chapter, §28-10-209.
- Construction and interpretation, §28-10-208.
- Severability of provisions, §28-10-211.

**Co-owners with right of survivorship.**

- Defined, §28-10-201.

**SIMULTANEOUS DEATH —Cont'd****Co-owners with right of survivorship —Cont'd**

- Requirement of survival by 120 hours, §28-10-204.

**Definitions, §28-10-201.****Effective date, §28-10-212.****Evidence of death, §28-10-205.****Exceptions, §28-10-206.****Governing instrument.**

- Defined, §28-10-201.
- Exceptions to provisions, §28-10-206.
- Requirement of survival by 120 hours, §28-10-203.

**Requirement of survival by 120 hours.**

- Co-owners with right of survivorship, §28-10-204.
- Governing instrument, §28-10-203.
- Probate code, §28-10-202.

**Severability of provisions, §28-10-211.****Short title, §28-10-209.****Third party liability, §28-10-207.****SMALL ESTATES.****Dispensing with administration,**

- §§28-41-101 to 28-41-104.

**Guardians.**

- Delivery of property and money to suitable person, §28-65-503.
- Ward receiving public assistance, §28-65-503.

**Official probate forms, Probate Law Appx (Title 28).****SOCIAL SERVICES.****Claims.**

- Decedents' estates.
- Reimbursement for nursing care, §28-13-103.

**Decedents' estates.**

- Claims for reimbursement for nursing care.
- Orders of court, §28-13-103.
- Escheat, §28-13-103.
- Reimbursement for nursing care, §28-13-103.
- Court findings and order, §28-13-103.
- Procedure, §28-13-103.

**Escheats.**

- Decedents' estates.
- Claims.
- Reimbursement for nursing care, §28-13-103.

**Nurses.**

- Decedents' estates.
- Claims for reimbursement for nursing care, §28-13-103.

**SOCIAL SERVICES —Cont'd****Orders.**

Decedents' estates.

Claims.

Reimbursement for nursing care,  
§28-13-103.

**SPENDTHRIFT TRUSTS, §28-73-502.****Retirement plans.**

Prohibition against alienation and  
attachment.

Presumed to be spendthrift trust,  
§28-69-501.

**STATE OF ARKANSAS.****Beneficiaries.**

Public trusts.

State or state subdivision as  
beneficiary, §§28-72-201 to  
28-72-207.

**Decedents' estates.**

Escheated estates, §§28-13-101 to  
28-13-112.

**Descent and distribution.**

Escheated estates, §§28-13-101 to  
28-13-112.

**Escheats.**

Decedents' estates.

Escheated estates, §§28-13-101 to  
28-13-112.

**Express trusts.**

State or state subdivision as  
beneficiary.

Public trusts, §§28-72-201 to  
28-72-207.

**Public trusts, §§28-72-201 to 28-72-207.****Trusts and trustees.**

Public trusts, §§28-72-201 to  
28-72-207.

**STATUTE OF LIMITATIONS.****Decedents' estates.**

Claims.

Contingent claims, §28-50-110.

Limitations on filing, §28-50-101.

**Trusts and trustees.**

Breach of trust.

Actions against trustees,  
§28-73-1005.

Revocable trusts.

Proceedings to contest validity of  
trust, §28-73-604.

**STATUTE OF NONCLAIM.****Decedents' estates.**

Limitation on filing claims,  
§28-50-101.

**STATUTORY CONSTRUCTION.****Prudent management of  
institutional funds.**

Construction and interpretation of  
provisions, §28-69-810.

**STAYS.****Probate proceedings.**

Appeal to stay proceedings in circuit  
court, §28-1-116.

**STERILIZATION.****Guardians.**

Decisions requiring court approval,  
§28-65-302.

**STILL BIRTHS.****Decedents' estates.**

Deceased viable fetus.

Jurisdiction, §28-1-118.

**STOCK AND STOCKHOLDERS.****Power of attorney.**

Grant of general authority,  
§28-68-206.

**SURVIVAL OF ACTIONS.****Decedents' estates.**

Claims.

Revivor equivalent to filing,  
§28-50-102.

Distributions, §28-53-107.

**SURVIVING SPOUSES.****Allowances.**

Decedents' estates, §§28-39-101 to  
28-39-105.

**Decedents' estates.**

Allowances, §§28-39-101 to 28-39-105.

Disposition of community property.

Perfection of title, §28-12-104.

Homesteads.

Generally, §§28-39-201 to 28-39-207.

Survivorship abolished, §28-8-101.

**Homesteads.**

Decedents' estates, §§28-39-201 to  
28-39-207.

**Income tax.**

Joint income tax refunds, §28-38-101.

**Intestate succession, §28-9-214.****Probate code.**

Joint income tax refund.

Right of survivor, §28-38-101.

**Wills.**

Taking against will.

General provisions, §§28-39-401 to  
28-39-407.

**SURVIVORSHIP.**

Abolished, §28-8-101.



## T

**TABLES OF DESCENT.**

**Devolution where estates do not pass under tables of descent,** §28-9-214.

**General provisions,** §28-9-214.

**TAXATION.****Decedents' estates.****Assets.**

Authority to execute joint tax returns, §28-49-117.

**Estate taxes.**

Apportionment, §§28-54-101 to 28-54-115.

**Disclaimer of property interests.**

Tax qualified disclaimer, §28-2-214.

**Estate taxes.**

Apportionment, §§28-54-101 to 28-54-115.

**Long-term intergenerational security trusts.**

Copy of agreement filed with income tax return, §28-72-504.

Distributions from trust, §28-72-505.

**Income tax.**

Copy of agreement filed with return, §28-72-504.

Penalty on distributions in violation of provisions, §28-72-505.

**Power of attorney.**

Authority granted under power, §28-68-216.

**Trusts and trustees.****Public trusts.**

Exemption from taxation, §28-72-207.

**TAX EXEMPTIONS.****Trusts and trustees.**

Public trusts, §28-72-207.

**TEMPORARY GUARDIANS.**

**Appointment,** §28-65-218.

**TENANTS BY THE ENTIRETIES.**

**Simultaneous death,** §28-10-204.

**THIRD PARTIES.****Simultaneous death act.**

Liability of third parties, §28-10-207.

**TIME.****Decedents' estates.****Escheated estates.**

Denial of title in county.

Time for pleadings, §28-13-106.

**TITLE.****Decedents' estates.****Real property.**

Sale, mortgage, lease or exchange.

Title documents, §28-51-307.

**TORTS.****Trusts and trustees.**

Liability of trustee, §§28-73-1010, 28-73-1011.

**TRANSFER-ON-DEATH SECURITY ACCOUNTS.**

**Applicable law,** §28-14-103.

**Applications,** §28-14-112.

**Construction of chapter,** §28-14-111.

**Definitions,** §28-14-101.

**Effect,** §28-14-106.

**Forms,** §§28-14-105, 28-14-110.

**Joint tenancy ownership,** §28-14-102.

**Nontestamentary transfer on death,** §28-14-109.

**Origination,** §28-14-104.

**Ownership on death of owner,** §28-14-107.

**Protection of registering entity,** §28-14-108.

**Short title,** §28-14-111.

**Sole ownership,** §28-14-102.

**Terms and conditions,** §28-14-110.

**TRANSFERS TO MINORS.****Power of attorney.**

Authority granted under power.

Account under transfers to minors act, §28-68-217.

**TREES AND TIMBER.****Dower and curtesy.**

Assignment of dower and curtesy.

**Agreement.**

Condition precedent to assignment, §28-39-302.

Sale of timber, §28-39-302.

Money or royalties received, §28-11-304.

Payment to surviving spouse, §28-11-304.

**Uniform principal and income act.**

Receipts normally apportioned, §28-70-412.

**TRIAL.****Decedents' estates.****Escheated estates.**

Denial of title in county, §28-13-106.

**Dower and curtesy.**

Assignment of dower and curtesy, §28-39-303.

**TRUSTEE DIVISION OF TRUSTS**  
**ACT, §§28-69-701 to 28-69-706.**

**TRUSTS AND TRUSTEES.**  
**Acceptance of trusteeship,**  
 §28-73-701.

**Actions.**

Enforcement and defense of claims of trust, §28-73-811.

**Administration.**

Attorneys' fees and costs, §28-73-1004.  
 Court's role in administration of trust, §28-73-201.

Jurisdiction over trustee and beneficiary, §28-73-202.

Subject-matter jurisdiction, §28-73-203.

Informing beneficiaries about trust administration.

Trustee's duties, §28-73-813.

Principal place of administration, §28-73-108.

Trustee's duties, §28-73-801.

Costs of administration, §28-73-805.

Prudent administration, §28-73-804.

**Amendments.**

**Fiduciaries.**

**Charitable trusts.**

Amendment of trust instrument by operation of law, §§28-72-301, 28-72-302.

**Public trusts.**

Amendment of trust instruments, §28-72-205.

Revocable trusts, §28-73-602.

**Animals, trust for care of.**

Creation of trust for care of animal, §28-73-408.

**Appointment of trustees, §28-73-704.**

**Arkansas trust code, §§28-73-101 to 28-73-1106.**

Application, §28-73-1106.

Uniformity of application, §28-73-1101.

Citation of chapter, §28-73-101.

Construction and interpretation, §28-73-112.

Uniformity, §28-73-1101.

Effective date, §28-73-1104.

Scope of provisions, §28-73-102.

Severability of provisions, §28-73-1103.

Title of chapter, §28-73-101.

**Attorneys' fees.**

Administration of trust, judicial proceedings involving, §28-73-1004.

**Banks.**

Deposit of funds in commercial department of bank, §28-69-206.

**TRUSTS AND TRUSTEES —Cont'd**

**Banks —Cont'd**

Services provided by affiliates, §28-69-207.

**Beneficiaries.**

Creditors or assignees, rights of, §28-73-501.

Informing beneficiaries about trust administration.

Trustee's duties, §28-73-813.

Jurisdiction over beneficiaries, §28-73-202.

**Public trusts.**

Trust effective upon acceptance by beneficiary, §28-72-202.

Who treated as qualified beneficiaries, §28-73-110.

**Bonds, surety.**

Trustee's bond, §28-73-702.

**Breach of trust.**

Beneficiary's consent, release or ratification, §28-73-1009.

Damages, §28-73-1002.

Absence of breach, §28-73-1003.

Events affecting administration or distribution, §28-73-1007.

Exculpatory terms of trust, §28-73-1008.

Limitation of actions, §28-73-1005.

Reliance on trust instrument, §28-73-1006.

Remedies, §28-73-1001.

**Certification of trust, §28-73-1013.**

**Charitable trusts.**

Creation, §28-73-405.

**Fiduciaries.**

Amendment of trust instrument by operation of law, §28-72-302.

Definitions, §28-72-301.

**Combination of trusts, §28-73-417.**

**Common law of trusts.**

Arkansas trust code.

Relationship between statute and common law, §28-73-106.

**Compensation of trustee, §28-73-708.**

**Conflict of laws.**

Testamentary additions to trusts.

Savings clause, §28-27-105.

**Construction and interpretation.**

Arkansas trust code, §28-73-112.

Uniformity of construction, §28-73-1101.

**Contracts.**

Interest of trustee as general partner, §28-73-1011.

Liability of trustee, §28-73-1010.



**TRUSTS AND TRUSTEES —Cont'd****Contracts —Cont'd**

## Public trusts.

Binding contract between state  
beneficiary and trustee,  
§28-72-202.

**Cotrustees, §28-73-703.****Creation of trust.**

Animals, trust for care of, §28-73-408.

Charitable trusts, §28-73-405.

Fraud, duress or undue influence,  
§28-73-406.

Methods of creating trust, §28-73-401.

Noncharitable trust without  
ascertainable beneficiary,  
§28-73-409.

Oral trusts, §28-73-407.

Other jurisdictions, trusts created in,  
§28-73-403.

Purposes of trust, §28-73-404.

Requirements, §28-73-402.

**Creditors or assignees of  
beneficiaries, rights of,  
§28-73-501.**

Overdue distribution, §28-73-506.

**Creditors or assignees of settlors.**

Claims against settlor, §28-73-505.

**Custodial trust.**

Applicability of subchapter,  
§28-72-419.

Augmenting existing trust, §28-72-402.

Beneficial interest in property,  
§28-72-402.

**Beneficiaries.**

Directions of beneficiary in  
management, control, etc.,  
§28-72-407.

**Incapacity.**

Determination, §28-72-410.

Effect, §28-72-410.

Citation of subchapter, §28-72-421.

**Construction and interpretation.**

Severability of provisions of  
subchapter, §28-72-422.

Uniformity of application and  
construction, §28-72-420.

**Creation.**

Form, §28-72-418.

Method, §§28-72-402, 28-72-418.

**Custodial trustee.**

Acceptance of property.

Effect, §28-72-404.

Form, §28-72-404.

Accounting, §28-72-415.

Acknowledgment of delivery.

Sufficient receipt and discharge  
for property transferred,  
§28-72-405.

**TRUSTS AND TRUSTEES —Cont'd****Custodial trust —Cont'd****Custodial trustee —Cont'd**

Bonds, surety, §28-72-414.

Compensation, §28-72-414.

Death, §28-72-413.

Declining to serve, §28-72-413.

**Duties.**

Generally, §28-72-407.

Exemption of third persons from  
liability, §28-72-411.

Expenses, §28-72-414.

Forms, §28-72-404.

Future payment or transfer,  
§28-72-403.

Incapacity, §28-72-413.

Jurisdiction, §28-72-404.

**Liability.**

Determination, §28-72-415.

Limitation of actions, §28-72-416.

**Powers.**

Fiduciary capacity, §28-72-408.

Generally, §28-72-408.

Records, §28-72-407.

Removal, §28-72-413.

Reports, §28-72-415.

Resignation, §28-72-413.

Successor trustees, §28-72-402.

Designation, §28-72-413.

**Third parties.**

Liability to, §28-72-412.

Title to property, §28-72-402.

Transfer by fiduciary or obligor,  
§28-72-405.

Definitions, §28-72-401.

**Distribution.**

Termination, §28-72-417.

Multiple beneficiaries, §28-72-406.

Occurrence of future event,  
§28-72-403.

Out-of-state transfers, §28-72-419.

**Property.**

Payment to or expenditure for  
beneficiary, §28-72-409.

Use of property, §28-72-409.

Separate trusts, §28-72-406.

Severability of provisions of  
subchapter, §28-72-422.

Short title of subchapter, §28-72-421.

Successor custodial trustee,  
§28-72-402.

Survivorship, §28-72-406.

Termination, §28-72-402.

Distribution, §28-72-417.

**Third parties.**

Exemption from liability,  
§28-72-411.

Liability to, §28-72-412.

**TRUSTS AND TRUSTEES —Cont'd****Custodial trust —Cont'd**

Title of property, §28-72-402.

Uniformity of application and construction of subchapter, §28-72-420.

**Cy pres, §28-73-413.**

Amendment of trust instrument by operation of law, §§28-72-301, 28-72-302.

**Damages.**

Absence of breach of trust, §28-73-1003.

Breach of trust, §28-73-1002.

**Decedents' estates.**

Distribution.

Applicability of provisions, §28-53-202.

**Default rules for trusts under trust code, §28-73-105.****Defenses.**

Enforcement and defense of claims of trust, §28-73-811.

**Definitions.**

Arkansas trust code, §28-73-103.

Custodial trust, §28-72-401.

Division of trusts by trustees, §28-69-702.

**Delegation of duties and powers.**

Trustee's delegation, §28-73-807.

**Disclaimer of property interests.**

Delivery of disclaimer, §28-2-212.

Disclaimer by trustee, §28-2-208.

**Discretionary powers of trustee, §28-73-814.****Discretionary trusts, §28-73-504.****Distribution of trust property, §28-73-817.**

Overdue distribution, §28-73-506.

Termination of trust.

Trustee's duties, §28-73-817.

**Division of trusts, §28-73-417.**

Trustee division of trust, §§28-69-701 to 28-69-706.

Applicability of provisions, §28-69-706.

Authority to divide trusts, §28-69-703.

Exercise by trustee, §§28-69-704, 28-69-705.

Citation of act, §28-69-701.

Definitions, §28-69-702.

Title of act, §28-69-701.

**Duties and powers of trustee,**

§§28-73-801 to 28-73-817.

Administration of trust, §§28-73-801, 28-73-804, 28-73-805.

**TRUSTS AND TRUSTEES —Cont'd****Duties and powers of trustee —Cont'd**

Control and protection of trust property, §28-73-809.

Delegation, §28-73-807.

Direction, §28-73-808.

Discretionary powers, §28-73-814.

Distribution of trust property, §28-73-817.

Enforcement and defense of claims of trust, §28-73-811.

Former trustees, actions with respect to, §28-73-812.

General powers, §28-73-815.

Impartiality, §28-73-803.

Informing beneficiaries about trust administration, §28-73-813.

Loyalty, §28-73-802.

Recordkeeping, §28-73-810.

Reports, §28-73-813.

Special skills and expertise, use of, §28-73-806.

Specific powers, §28-73-816.

**Electronic signatures and records, §28-73-1102.****Evidence.**

Oral trusts.

Creation, §28-73-407.

**Expenses of trustee.**

Reimbursement, §28-73-709.

**Express trusts with state or state subdivision as beneficiary, §§28-72-201 to 28-72-207.****Fiduciaries.**

Arkansas trust code.

Representation by fiduciaries, §28-73-303.

Definition of fiduciary to include trustee, §28-69-201.

**Forms.**

Custodial trust.

Acceptance of property.

Custodial trustee, §28-72-404.

**Fraud.**

Creation of trust.

Fraud, duress or undue influence, §28-73-406.

**General powers of trustee, §28-73-815.****Governing law, §28-73-107.**

Arkansas trust code, §28-73-107.

**Impartiality of trustee, §28-73-803.****Income.**

Principal and income act generally, §§28-70-101 to 28-70-606.



**TRUSTS AND TRUSTEES —Cont'd**  
**Indorsements.**

Public trusts.

Acceptance indorsed on trust instrument, §28-72-202.

**Investments.**

Prudent investor rule, §§28-73-901 to 28-73-908.

Prudent man rule for investments, §§28-71-101 to 28-71-107.

**Jurisdiction over trustee, §28-73-202.****Knowledge of facts, §28-73-104.****Leases.**

Public trusts.

Lease of property to trustee, §28-72-204.

**Liability.**

Public trusts.

Liability of trustee, §28-72-206.

**Limitation of actions.**

Breach of trust.

Actions against trustees, §28-73-1005.

Revocable trusts.

Proceedings to contest validity of trust, §28-73-604.

**Limitation of liability of trustee, §28-73-1010.**

Persons dealing with trustee, §28-73-1012.

**Long-term intergenerational security trusts, §§28-72-501 to 28-72-507.****Loyalty of trustee, §28-73-802.****Mandatory trust provisions.**

Arkansas trust code, §28-73-105.

**Minors.**

Long-term intergenerational security trusts, §§28-72-501 to 28-72-507.

**Missing persons.**

Administration of estates, §§28-72-101 to 28-72-104.

**Modification of trust.**

Combination or division of trusts, §28-73-417.

Consent, §28-69-401.

Cy pres, §28-73-413.

Furthering purposes of trust, §28-73-412.

Liability of trustee, §28-69-402.

Noncharitable irrevocable trusts, §28-73-411.

Proceedings for approval or disapproval, §28-73-410.

Reformation of terms, §28-73-415.

Settlor's tax objectives, modification to achieve, §28-73-416.

Uneconomic trusts, §28-73-414.

**TRUSTS AND TRUSTEES —Cont'd**  
**Modification of trust —Cont'd**

Use of other means not precluded, §28-69-403.

**Nonjudicial settlement agreements, §28-73-111.****Notice.**

Knowledge or notice of facts, §28-73-104.

Methods of notice, §28-73-109.

Transfer of principal place of administration, §28-73-108.

**Oral trusts.**

Evidence of creation, §28-73-407.

**Overdue distribution, §28-73-506.****Partnerships.**

Interest of trustee as general partner, §28-73-1011.

**Personal obligations of trustee.**

Trust property not subject to, §28-73-507.

**Persons dealing with trustee.**

Limitation of liability, §28-73-1012.

**Pour-overs.**

Testamentary additions to trusts, §§28-27-101 to 28-27-106.

**Powers of attorney.**

Authority granted under power, §28-68-211.

Gifts to a trust, §28-68-217.

**Principal and income act,**

§§28-70-101 to 28-70-606.

**Principal place of administration, §28-73-108.****Property of trust.**

Control and protection of trust property.

Trustee's duties, §28-73-809.

**Prudent investor rule.**

Fiduciaries, §§28-71-101 to 28-71-107.

Trustees, §§28-73-901 to 28-73-908.

Applicability, §28-73-907.

Uniformity, §28-73-908.

Compliance with rule, §28-73-905.

Construction.

Uniformity, §28-73-908.

Diversification of investments, §28-73-903.

Duties of trustee, §§28-73-901, 28-73-904.

Language invoking rule, §28-73-906.

Standard of care, §28-73-902.

**Public trusts.**

Acceptance.

Trust effective upon acceptance by beneficiary, §28-72-202.

Amendment of trust instrument.

Authorized, §28-72-205.

**TRUSTS AND TRUSTEES —Cont'd****Public trusts —Cont'd**

Appointment of trustees, §28-72-203.

Authorized, §28-72-201.

Beneficiaries.

Trust effective upon acceptance by beneficiary, §28-72-202.

Contracts.

Binding contract between state beneficiary and trustee, §28-72-202.

Creation, §28-72-201.

Effective upon acceptance by beneficiary, §28-72-202.

Exemption from taxation, §28-72-207.

Indorsements.

Acceptance indorsed on trust instrument, §28-72-202.

Lease of property to trustee, §28-72-204.

Liability of trustees, §28-72-206.

Powers of trustees, §28-72-203.

Purposes, §28-72-201.

Taxation.

Exemption from taxation, §28-72-207.

Termination of trust instrument.

Authorized, §28-72-205.

**Recordkeeping, §28-73-810.**

**Reformation of terms, §28-73-415.**

**Rejection of trusteeship, §28-73-701.**

**Removal of trustee, §28-73-706.**

Delivery of trust property, §28-73-707.

**Reports.**

Trustee's reports, §28-73-813.

**Representatives.**

Appointment of representative, §28-73-305.

Effect, §28-73-301.

Fiduciaries and parents, §28-73-303.

Holder of general testamentary power of appointment, §28-73-302.

Persons having substantially identical interests, §28-73-304.

**Resignation of trustee, §28-73-705.**

Delivery of trust property, §28-73-707.

**Retirement.**

Long-term intergenerational security trusts, §§28-72-501 to 28-72-507.

Spendthrift trust.

Prohibition against alienation and attachment.

Presumed to be spendthrift trust, §28-69-501.

**Revocable trusts.**

Amendment, §28-73-602.

Capacity of settlor, §28-73-601.

**TRUSTS AND TRUSTEES —Cont'd****Revocable trusts —Cont'd**

Distribution of trust property, §28-73-604.

Limitation of actions.

Proceedings to contest validity of trust, §28-73-604.

Revocation, §28-73-602.

Settlor's powers, §28-73-603.

**Revocation, modification or termination of trust.**

Consent, §28-69-401.

Cy pres, §28-73-413.

Distribution of trust property.

Trustee's duties, §28-73-817.

Furthering purposes of trust, §28-73-412.

Liability of trustee, §28-69-402.

Noncharitable irrevocable trusts, §28-73-411.

Proceedings for approval or disapproval, §28-73-410.

Uneconomic trusts, §28-73-414.

Use of other means not precluded, §28-69-403.

When trust terminates, §28-73-410.

**Rules governing trusts under trust code, §28-73-105.**

**Scope of trust code, §28-73-102.**

**Settlement agreements.**

Nonjudicial settlement agreements, §28-73-111.

**Settlors.**

Creditors' claims against settlors, §28-73-505.

**Special skills and expertise of trustee.**

Use, §28-73-806.

**Specific powers of trustee,**

§28-73-816.

**Spendthrift trust, §28-73-502.**

Retirement plan.

Prohibition against alienation and attachment.

Presumed to be spendthrift trust, §28-69-501.

**State of Arkansas.**

Express trusts.

State or state subdivision as beneficiary, §§28-72-201 to 28-72-207.

**Taxation.**

Public trusts.

Exemption from taxation, §28-72-207.

**Termination of trust.**

Consent, §28-69-401.

Cy pres, §28-73-413.



**TRUSTS AND TRUSTEES —Cont'd****Termination of trust —Cont'd**

Distribution of trust property.

Trustee's duties, §28-73-817.

Furthering purposes of trust,  
§28-73-412.

Liability of trustee, §28-69-402.

Noncharitable irrevocable trusts,  
§28-73-411.Proceedings for approval or  
disapproval, §28-73-410.

Uneconomic trusts, §28-73-414.

Use of other means not precluded,  
§28-69-403.

When trust terminates, §28-73-410.

**Testamentary additions to trusts,**  
§28-27-101.

Applicability of provisions, §28-27-102.

Effective date, §28-27-106.

Uniformity of application,  
§28-27-103.

Conflict of laws.

Savings clause, §28-27-105.

Effective date of provisions,  
§28-27-106.

Savings clause, §28-27-105.

Short title, §28-27-104.

Uniformity of interpretation,  
§28-27-103.**Torts.**Liability of trustee, §§28-73-1010,  
28-73-1011.**Transfer of principal place of  
administration, §28-73-108.****Trustee division of trusts,**  
§§28-69-701 to 28-69-706.**Uniform prudent investor act,**  
§§28-73-901 to 28-73-908.**Uniform testamentary additions to  
trust act, §§28-27-101 to 28-27-106.****Vacancies in trusteeship, §28-73-704.****Wills.**Testamentary additions to trusts,  
§§28-27-101 to 28-27-106.**U****UNCLAIMED PROPERTY.****Decedents' estates.**

Assets.

Abandonment of property,  
§28-49-106.**Wills.**Lost or destroyed wills, §§28-40-301 to  
28-40-304.**UNIFORM LAWS.****Adult guardianship and protective  
proceedings jurisdiction,**  
§§28-74-101 to 28-74-505.**Decedents' estates.**Uniform disposition of community  
property rights at death act,  
§§28-12-101 to 28-12-113.**Descent and distribution.**Uniform simultaneous death act,  
§§28-10-201 to 28-10-212.**Disclaimer of property interests,**  
§§28-2-201 to 28-2-221.**Estate tax apportionment,**  
§§28-54-101 to 28-54-115.**Guardians.**Uniform veterans' guardianship act,  
§§28-66-101 to 28-66-124.**Institutional funds, prudent  
management, §§28-69-801 to  
28-69-810.****Power of attorney, uniform act,**  
§§28-68-101 to 28-68-405.**Prudent investor act, §§28-73-901 to  
28-73-908.****Prudent management of  
institutional funds, §§28-69-801 to  
28-69-810.****Securities.**Transfer on death security  
registration, §§28-14-101 to  
28-14-112.**Simultaneous death act, §§28-10-201  
to 28-10-212.****Trusts and trustees.**Uniform prudent investor act,  
§§28-73-901 to 28-73-908.Uniform testamentary additions to  
trusts act, §§28-27-101 to  
28-27-106.**Veterans' guardianship act,**  
§§28-66-101 to 28-66-124.**Wills.**Uniform testamentary additions to  
trusts act, §§28-27-101 to  
28-27-106.**V****VENUE.****Guardians.**Actions by ward against guardian,  
§28-65-109.

Administration of ward's estate.

Action by ward for settlement of  
accounts, §28-65-109.

Appointment, §28-65-202.

**VENUE —Cont'd****Probate code**, §28-40-102.**Wills.**

Probate of wills, §28-40-102.

**VETERANS.****Guardians.**Veterans' guardianship act,  
§§28-66-101 to 28-66-124.**Power of attorney.**Authority granted under power.  
Governmental or civil or military  
service, benefits from,  
§28-68-214.**Veterans' guardianship act**,  
§§28-66-101 to 28-66-124.**VETERANS AFFAIRS  
DEPARTMENT.****Veterans' guardianship act.**Commitment to department of  
veterans affairs, §28-66-118.  
Defined, §28-66-101.**VETERANS' GUARDIANSHIP ACT.****Accounts and accounting**, §28-66-110.Certificate of examination of securities  
or investments, §28-66-110.  
Copies sent to department of  
veterans affairs office,  
§28-66-110.**Copies.**Failure to account or furnish copies,  
§28-66-111.  
Penalties, §28-66-111.Discharge of guardian upon final  
accounting, §28-66-117.Notice of hearing on account,  
§28-66-110.Property derived from other sources,  
§28-66-110.Release of sureties upon final  
accounting, §28-66-117.**Administrator.**Defined, §28-66-101.  
Interested parties, §28-66-102.**Applicability of provisions**,  
§28-66-123.**Appointment of guardians**,  
§28-66-103.**Notice.**Filing of petitions, §28-66-108.  
Petitions, §28-66-105.  
Contents, §28-66-105.  
Notice of filing, §28-66-108.  
Rating of incompetency, §28-66-105.  
Prior to payment of benefits,  
§28-66-103.**Benefits.**

Defined, §28-66-101.

**VETERANS' GUARDIANSHIP ACT  
—Cont'd****Bonds, surety**, §28-66-109.Applicability of provisions, §28-66-123.  
Release of sureties upon final  
accounting, §28-66-117.**Certificates of public convenience  
and necessity.**Guardians for mentally incompetent,  
§28-66-107.

Guardians for minors, §28-66-106.

**Citation of chapter.**

Short title, §28-66-120.

**Civil procedure.**

Applicable provisions, §28-66-122.

**Compensation of guardians**,  
§28-66-112.**Construction and interpretation.**Severability of provisions, §28-66-121.  
Uniformity of law, §28-66-119.**Copies.**Failure to account or furnish copies,  
§28-66-111.  
Penalties, §28-66-111.  
Records.  
Furnished without charge,  
§28-66-116.**Definitions.**Administrators, §28-66-101.  
Benefits, §28-66-101.  
Department of veterans affairs,  
§28-66-101.  
Estate, §28-66-101.  
Guardians, §28-66-101.  
Income, §28-66-101.  
Ward, §28-66-101.**Discharge of guardians upon final  
accounting**, §28-66-117.**Effective date**, §28-66-124.**Estate.**

Defined, §28-66-101.

**Fiduciaries.**Prudent man rule for investments.  
Uniform veterans' guardianship act  
not affected, §28-71-101.**Guardians.**Applicability of provisions, §28-65-102.  
Defined, §28-66-101.  
Provisions cumulative to, §28-65-102.**Hearings.**

Notice, §28-66-102.

**Incapacitated persons.**Applicability of guardianship  
provisions, §28-65-102.**Income.**

Defined, §28-66-101.

**Investments**, §28-66-113.

Common trust fund, §28-66-113.



**VETERANS' GUARDIANSHIP ACT**

—Cont'd

**Investments —Cont'd**

Court order necessary, §28-66-113.

Exceptions, §28-66-113.

Prudent man rule.

Uniform veterans' guardianship act  
not affected, §28-71-101.**Jurisdiction.**

Mental health.

Jurisdiction over committed persons,  
§28-66-118.**Liens.**Purchaser at foreclosure of ward's lien,  
§28-66-115.**Limitation on number of wards,**

§28-66-104.

**Mental health.**

Certificate of competency, §28-66-117.

Commitment to department of  
veterans affairs or other United  
States government agency,  
§28-66-118.

Guardians for mentally incompetent.

Certificates of public convenience  
and necessity, §28-66-107.Jurisdiction over person committed,  
§28-66-118.

Out of state commitment, §28-66-118.

Transfer of committed persons,  
§28-66-118.**Minors.**

Certificate of majority, §28-66-117.

Guardians for minors.

Certificate of necessity, §28-66-106.

**Notice.**

Accounts and accounting.

Hearings on accounts, §28-66-110.

Appointment of guardians.

Filing of petition, §28-66-108.

Hearings, §28-66-102.

**Orders.**

Investments, §28-66-113.

Purchase of real property.

Order of court required, §28-66-115.

**Parties.**

Administrator of veterans' affairs.

Interested party, §28-66-102.

**Penalties.**Failure to account or furnish copies,  
§28-66-111.**Petitions.**

Appointment of guardians, §28-66-105.

Contents, §28-66-105.

Rating of incompetency, §28-66-105.

**Prudent man rule.**Uniform veterans' guardianship act  
not affected, §28-71-101.**VETERANS' GUARDIANSHIP ACT**

—Cont'd

**Real property.**

Partition of land, §28-66-115.

Purchase of home for ward,  
§28-66-115.Evidence of value and title,  
§28-66-115.

Order of court required, §28-66-115.

Purchaser at foreclosure of ward's  
lien, §28-66-115.**Records.**

Copies.

Furnished without charge,  
§28-66-116.**Repeal of inconsistent acts,**

§28-66-122.

**Severability of provisions,**

§28-66-121.

**Short title of chapter, §28-66-120.****Support and maintenance,**

§28-66-114.

**Time of taking effect, §28-66-124.****Title of chapter.**

Short title, §28-66-120.

**Veterans affairs department.**Commitment to department of  
veterans affairs, §28-66-118.

Defined, §28-66-101.

**Wards.**

Defined, §28-66-101.

Limitation on number, §28-66-104.

**W****WAIVER.****Decedents' estates.**

Bonds, surety, §28-48-206.

Filing of formal accounting,  
§28-52-104.

Inventory, §28-49-110.

Waiver of landlord's lien, §28-51-309.

**Landlord and tenant.**

Landlords' liens.

Decedents' estates.

Waiver of landlords' liens,  
§28-51-309.**Liens.**

Landlords' liens.

Decedents' estates.

Waiver of landlords' liens,  
§28-51-309.**WARDS.****Conservators for elderly and  
individuals with disabilities,**  
§§28-67-101 to 28-67-111.**Guardians, §§28-65-101 to 28-65-604.**

**WILLS.****Ademption.**

Sale of ward's property.

Not an ademption, §28-24-102.

**Adoption.**

Taking against will.

Rights of subsequently adopted children, §28-39-407.

**Affidavits.**

Attesting witnesses, §28-25-106.

Use as evidence in probate, §28-25-106.

**After-acquired property.**

Operation of will, §28-26-102.

**Afterborn children.**

Taking against will.

Rights of subsequently born children, §28-39-407.

**Age.**

Who may make wills, §28-25-101.

Who may witness, §28-25-102.

**Ancillary probate of foreign wills,**  
§28-40-120.**Ante-mortem probate act,** §§28-40-201  
to 28-40-203.**Anti-lapse act,** §28-26-104.**Applications.**

By verified petition, §28-1-109.

Objections to petition, §28-1-110.

**Attested wills.**

Affidavits of witnesses, §28-25-106.

Probate of wills.

Proof of attested will by other evidence, §28-40-117.

Testimony to prove will, §28-40-117.

**Burden of proof.**

Lost or destroyed wills, §28-40-302.

**Children.**

Anti-lapse statute.

Failure of testamentary provision, §28-26-104.

Failure of testamentary provisions, §28-26-104.

Taking against will.

Pretermitted children, §28-39-407.

Subsequently born or adopted children, §28-39-407.

**Codicils.**

Construction of "wills" to include codicils, §28-1-102.

**Community property.**

Disposition of community property.

Limitations on testamentary disposition, §28-12-109.

**Conflict of laws.**

Testamentary additions to trusts.

Savings clause, §28-27-105.

**WILLS —Cont'd****Construction and interpretation,**  
§28-26-101.

Probate of wills.

"Will" includes codicil, §28-1-102.

**Contracts.**

Contracts concerning succession, §28-24-101.

Devise of property subject to contract to convey, §28-24-101.

**Counties.**

Recording in other counties, §28-40-123.

**Death of devisee.**

Failure of testamentary provisions, §28-26-104.

**Declaratory judgments.**

Ante-mortem probate act.

Establishing validity of will, §28-40-202.

**Deposit of will with court in**  
**testator's lifetime,** §28-25-108.

Opening.

When will to be opened, §28-25-108.

**Devise of encumbered property,**  
§28-26-105.**Disclaimer of property interests,**  
§§28-2-201 to 28-2-221.**Dispensing with administration,**  
§§28-41-101 to 28-41-104.**Distribution of estate property.**

Applicability of provisions, §28-53-202.

**Divorce.**

Revocation by change in circumstances, §28-25-109.

**Dower and curtesy.**

Provision in will in lieu of dower or curtesy in lands, §28-11-403.

**Encumbered property.**

Devise, §28-26-105.

**Estate tax apportionment.**

By will or other dispositive instrument, §28-54-103.

**Evidence.**

Affidavits of attesting witnesses, §28-25-106.

Probate of wills.

Lost or destroyed wills, §28-40-117.

Manner of taking testimony, §28-40-118.

No will effectual until probated.

Unprobated wills admitted as evidence, §28-40-104.

Act supplemental to existing laws, §28-40-104.

Proof of attested will by other evidence, §28-40-117.

Testimony to prove will, §28-40-117.



**WILLS —Cont'd****Executions, §28-25-103.**

Foreign execution, §28-25-105.

Witnesses, §28-25-103.

**Executors and administrators.**Allowance for defending will,  
§28-48-109.

Probate of wills, §28-40-106.

**Failure of testamentary provisions,  
§28-26-104.****Fiduciaries.**Incorporation of trust powers by  
reference, §§28-69-301 to  
28-69-305.**Foreign execution, §28-25-105.****Foreign wills.**

Probate of wills.

Ancillary probate, §28-40-120.

**Forms.**Official probate forms, Probate Law  
Appx (Title 28).

Taking against will, §28-39-404.

**Guardians.**Preferences in appointment of  
guardian.

Request in parent's will, §28-65-204.

Sale of ward's property.

Not an ademption, §28-24-102.

**Holographic wills, §28-25-104.**

Probate of wills.

Testimony to prove will, §28-40-117.

**Incorporation of writing by  
reference, §28-25-107.**Disposition of property by extraneous  
writing, §28-25-107.**Injunctions.**

Lost or destroyed wills.

Restraint of proceedings, §28-40-304.

**Intestate succession.**Failure of testamentary provisions,  
§28-26-104.

Partial intestacy, §28-26-103.

**Invalid wills.**

Revival, §28-25-110.

**Jurisdiction.**

Construction of will, §28-26-101.

Lost or destroyed wills, §28-40-301.

**Letters testamentary and of  
administration.**

Probate of wills.

When probate ordered and letters  
granted, §28-40-119.**Liability.**

Probate of wills.

Custodian of will, §28-40-105.

**Lost or destroyed wills.**

Burden or proof, §28-40-302.

Establishment, §28-40-301.

**WILLS —Cont'd****Lost or destroyed wills —Cont'd**Injunctions to restrain proceedings,  
§28-40-304.

Jurisdiction, §28-40-301.

Letters testamentary and of  
administration, §28-40-304.

Probate of wills.

Testimony to prove will, §28-40-117.

Record of decree, §28-40-303.

Restraint of proceedings, §28-40-304.

Witnesses, §28-40-302.

**Marriage.**Revocation by change in  
circumstances, §28-25-109.**Minors.**Failure of testamentary provisions,  
§28-26-104.

Taking against will.

Rights of children or issue.

Pretermitted children, §28-39-407.

Subsequently born or adopted  
children, §28-39-407.**Missing persons.**

Probate of wills.

Search for alleged decedent,  
§28-40-112.**Nonresidents.**Probate of nonresident's will,  
§28-40-120.**Notice.**Appointment of personal  
representative.

Creditors to be notified, §28-40-111.

Taking against will, §28-39-402.

**Partial intestacy, §28-26-103.****Parties.**

Probate of wills.

Ante-mortem probate act,  
§28-40-202.**Personal property.**Dispositions by extraneous writings,  
§28-25-107.**Pour-overs.**Testamentary additions to trusts,  
§§28-27-101 to 28-27-106.**Pretermitted children.**

Taking against will.

Rights, §28-39-407.

**Probate of wills.**Ancillary probate of foreign wills,  
§28-40-120.

Ante-mortem probate act.

Citation of subchapter, §28-40-201.

Court findings, §28-40-203.

Declaratory judgments.

Establishing validity of wills,  
§28-40-202.

**WILLS —Cont'd****Probate of wills —Cont'd**

## Ante-mortem probate act —Cont'd

Finding of validity, §28-40-203.

Institution of actions, §28-40-202.

Nature of property right,  
§28-40-202.

Parties, §28-40-202.

Service of process, §28-40-202.

Short title, §28-40-201.

## Attested wills.

Proof of attested will by other  
evidence, §28-40-117.

Testimony to prove will, §28-40-117.

Certificate of probate, §28-40-122.

Character of proceedings, §28-40-101.

Construction and interpretation.

“Will” includes codicil, §28-1-102.

Contesting probate, §28-40-113.

## Grounds.

Filing, §28-40-113.

Rights of persons acquiring  
interest in property prior to  
filing of objections,  
§28-40-115.Interest in property acquired prior  
to filing of objections.Rights of persons acquiring  
interest, §28-40-115.

Notice, §28-40-114.

## Custodian of will.

Duty, §28-40-105.

Liability, §28-40-105.

## Effect of probate or grant of

administration, §28-40-121.

## Evidence.

Attested wills, §28-40-117.

Proof of attested will by other  
evidence, §28-40-117.

Holographic wills, §28-40-117.

Lost or destroyed wills, §28-40-117.

Manner of taking testimony,  
§28-40-118.

No will effectual until probated.

Unprobated wills admitted as  
evidence, §28-40-104.Act supplemental to existing  
laws, §28-40-104.Proof of attested will by other  
evidence, §28-40-117.

Testimony to prove will, §28-40-117.

## Executors and administrators.

## Nominated executors.

Powers prior to appointment,  
§28-40-106.Powers of nominated executor prior  
to appointment, §28-40-106.**WILLS —Cont'd****Probate of wills —Cont'd**

## Foreign wills.

Ancillary probate, §28-40-120.

## Holographic wills.

Testimony to prove will, §28-40-117.

Letters testamentary and of  
administration.When probate ordered and letters  
granted, §28-40-119.

## Lost or destroyed wills.

Testimony to prove will, §28-40-117.

## Missing persons.

Search for alleged decedent,  
§28-40-112.

Nonresidents, §28-40-120.

## Notice.

Contesting probate, §28-40-114.

Petitions for probate and  
appointment of personal  
representatives.Appointment of personal  
representative, §28-40-111.Demand for notice of proceedings,  
§28-40-108.

Hearing on petition, §28-40-110.

Without notice, §28-40-109.

Request for special notice of  
hearings, §28-40-108.No will effectual until probated,  
§28-40-104.Unprobated wills admitted as  
evidence, §28-40-104.Act supplemental to existing laws,  
§28-40-104.

## Parties.

Ante-mortem probate act,  
§28-40-202.Petitions for probate and appointment  
of personal representatives.

Contents, §28-40-107.

## Hearings.

Hearings on petition without  
notice, §28-40-109.Notice of hearing on petition,  
§28-40-110.Interested persons may petition,  
§28-40-107.

## Notice.

Appointment of personal  
representatives, §28-40-111.Demand for notice of proceedings,  
§28-40-108.

Hearings on petition, §28-40-110.

Hearings on petition without  
notice, §28-40-109.

Purpose, §28-40-107.

Who may petition, §28-40-107.



**WILLS —Cont'd****Probate of wills —Cont'd**

Presentation for probate.

Subsequent to certain events,  
§28-40-116.

Proof of wills, §28-40-117.

Recordation.

Recording in other counties,  
§28-40-123.

Record of wills, §28-1-108.

Search for alleged decedent,  
§28-40-112.

Service of process.

Ante-mortem probate act,  
§28-40-202.

Subsequent presentation for probate,  
§28-40-116.

Time limit, §28-40-103.

Venue, §28-40-102.

When ordered and letters granted,  
§28-40-119.

**Proof of wills, §28-40-117.**

**Property.**

Will to operate on after-acquired  
property, §28-26-102.

**Recordation.**

Recording in other counties,  
§28-40-123.

**Record of wills, §28-1-108.**

Lost or destroyed wills.

Decree of establishment, §28-40-303.

**Revival of revoked or invalid will,  
§28-25-110.**

**Revocation.**

By act on document, §28-25-109.

By change in circumstances,  
§28-25-109.

By written will, §28-25-109.

Divorce, §28-25-109.

Marriage, §28-25-109.

Revival of revoked or invalid will,  
§28-25-110.

**Sale, mortgage, lease or exchange of  
estate property.**

When power given in will, §28-51-102.

**Sale of ward's property.**

Not an ademption, §28-24-102.

**Service of process.**

Probate of wills.

Ante-mortem probate act,  
§28-40-202.

**Simultaneous death.**

Inapplicability of provisions.

When will or contract provides  
otherwise, §28-10-206.

**Small estates.**

Dispensing with administration,  
§§28-41-101 to 28-41-104.

**WILLS —Cont'd****Statements in writing.**

Incorporation of writing by reference,  
§28-25-107.

**Taking against will.**

Children or issue.

Rights of children or issue.

Pretermitted children, §28-39-407.

Subsequently born or adopted  
children, §28-39-407.

Filing, §28-39-404.

Form of election, §28-39-404.

Notice of right to elect, §28-39-402.

Personal nature of right of election,  
§28-39-405.

Pretermitted children, §28-39-407.

Revocation of election, §28-39-406.

Rights of surviving spouse, §28-39-401.  
Limitations, §28-39-401.

Time limitation for filing election,  
§28-39-403.

When election may be revoked,  
§28-39-406.

**Testamentary additions to trusts,  
§28-27-101.**

Applicability of provisions, §28-27-102.

Effective date, §28-27-106.

Uniformity of application,  
§28-27-103.

Conflict of laws.

Savings clause, §28-27-105.

Effective date of provisions,  
§28-27-106.

Savings clause, §28-27-105.

Short title, §28-27-104.

Uniformity of interpretation,  
§28-27-103.

**Time limits.**

Probate of wills, §28-40-103.

**Uniform testamentary additions to  
trusts act, §§28-27-101 to  
28-27-106.**

**Venue.**

Probate of wills, §28-40-102.

**Witnesses.**

Affidavit of attesting witness,  
§28-25-106.

Use as evidence in probate,  
§28-25-106.

Execution of wills, §28-25-103.

Lost or destroyed wills, §28-40-302.

Who may witness, §28-25-102.

**Writing.**

Holographic wills, §28-25-104.

Incorporation of writing by reference,  
§28-25-107.

Disposition of property by  
extraneous writing, §28-25-107.

**WITNESSES.****Adult guardianship and protective proceedings jurisdiction.**

Deposition of witness from another state, §28-74-106.

**Decedents' estates.**

Assets.

Continuation of business, §28-49-112.

**Wills.**

Affidavit of attesting witness, §28-25-106.

Use as evidence in probate, §28-25-106.

Execution of wills, §28-25-103.

Lost or destroyed wills, §28-40-302.

Who may witness, §28-25-102.

**WORLD BANK.****Fiduciaries.**

Obligations deemed legal investments, §28-69-205.

**WORTHIER TITLE.****Intestate succession.**

Doctrine abolished, §28-9-220.

**WRITINGS.****Holographic wills, §28-25-104.****WRITS.****Decedents' estates.**

Escheated estates.

Real property.

Writ for seizure, §28-13-108.

**Escheated estates.**

Decedents' estates.

Real property.

Writ for seizure, §28-13-108.

















